Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

FIFTH AVENUE PRESBYTERIAN CHURCH, GLADYS ESCALERA, NICHOLAS NESRON, WILLIAM P. RASMUSSEN, DONALD J. ROBISON, VERONICA A. LESTER, ALFRED MCKENZIE, ALFRED BROWN, DENNIS PAIGE, PEABODY DENNIS, STEFAN PARY, and MARGARET SHAFER,

Respondents,

-against-

THE CITY OF NEW YORK, BERNARD KERIK, and RUDOLPH GIULIANI,

Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
MORDECAI NEWMAN.
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August 26, 2004

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QUESTION PRESENTED

Did the holding of the United States Court of Appeals for the Second Circuit stating that the Church's maintaining of a nightly encampment on its steps is constitutionally protected religious conduct err by failing to consider that the Church's failure to provide security, toilets and sanitary facilities, and shelter from the elements stands in direct contradiction to the religious doctrine of serving the needy, which the Church cites as the basis for maintaining the encampment?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

OPINIONS BELOW 1

JURISDICTION 3

STATEMENT OF THE CASE 3

A. The underlying facts 5

B. The complaint 5

C. The temporary restraining order 5

D. The preliminary injunction 5

E. The affirmance of the preliminary injunction by the United States Court of Appeals for the Second Circuit 6

F. Discovery 7

G. Motion and cross-motion for summary judgment 8

H. District Court's opinion granting a permanent injunction against the City 8

I. The opinion of the United States District Court for the Second Circuit 10

REASONS FOR GRANTING THE PETITION 11

CONCLUSION 19

APPENDIX

District Court Order granting Temporary Restraining Order, dated December 19, 2001 ..... A1

District Court Order granting Preliminary Injunction, dated January 4, 2002 ..... A5

Second Circuit Court of Appeals Opinion and Order affirming Preliminary Injunction, dated June 12, 2002 ..... A27

District Court Memorandum an Order granting Permanent Injunction, dated October 28, 2004 ..... A47

District Court Judgment granting Permanent Injunction A88

Second Circuit Court of Appeals Opinion and Order affirming Permanent Injunction A91

TABLE OF AUTHORITIES

Cases **Page**

Chertkova v. Connecticu Gen. Life Insurance,
92 F.3d 81 (2nd Cir. 1996) 17
Church of Lukumi Babalu Aye v. City of Hialeah,
580 U.S. 520 (1993) 6

Coogan v. Smyers,
134 F.3d 479 17
Fifth Avenue Presbyterian Church v. City of New York,
2006 U.S. App. LEXIS 10731 2
Fifth Avenue Presbyterian Church v. City of New York,
293 F.3d 570 (2nd Cir. 2002) 6, 9

Lawrence School Corporation v. Lewis,
303 NY 484 (1952) 15

McCain v. Koch,
70 NY2d 109 (1987). 12-13

New York Botanical Garden v. Board of Standards and Appeals,
912 NY2d 413 (1998) 15-16

Stringfellow's of New York,
91 NY2d 382 (1998) 15

Thomas v. Review Board of the Indiana Employment Security Divison,
450 U.S. 707 (1981) 11, 14

Wisconsin v. Yoder,
406 U.S. 205 (1972) 6

Statutory Provisions

United States Code

Title 28, Section 1254 3

Title 42, Section 1983 5

Title 42, Section 2000cc 16

New York Constitution

Article I, Section 3 5

New York City Zoning Resolution

Section 12-10 12

Section 71-10 16

New York City Charter

Section 435(a) 17

New York City Administrative Code

Section 26-126(a) 17

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Respondents,

-against-

THE CITY OF NEW YORK, BERNARD KERIK, RUDOLPH GIULIANI and MICHAEL R. BLOOMBERG,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit from which petitioners City of New York, Bernard Kerik, Rudolph Giuliani, and Michael R. Bloomberg (jointly "petitioners" or "the City") seek certiorari, was decided on April 26, 2006. The opinion was

not reported but may be accessed at 2006 U.S. App. LEXIS 10731 and appears in the Appendix at p. 91. It permanently enjoins the City "from entering on to the property of the plaintiff Fifth Avenue Presbyterian Church . . . for the purposes of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property."[1]

The Second Circuit judgment of April 26, 2006, followed an appeal from an opinion and order of the United States District Court for the Southern District of New York (McKenna, U.S.J.D.), dated October 28, 2004, which likewise permanently enjoined the City from entering onto the property of the respondent Fifth Avenue Presbyterian Church ("respondent" or 'the Church") "for the purposes of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property. The District Court order appears in the Appendix at p. 47.

A grant of certiorari in this case would also bring up for review the Second Circuit's opinion and order (one paper) of June 12, 2002, which affirmed a preliminary injunction in favor of the Church.

That order followed an appeal from a memorandum and order of the United States District Court for the Southern District of New York, dated January 4, 2002, which granted the Church a preliminary injunction

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[1] The Second Circuit, however, declined to enjoin the City from dispersing individuals sleeping on Church property at sidewalk level. The Church has filed a "Petition for Rehearing on Cross-Appeal," dated May 11, 2006, seeking reversal of that aspect of the judgment. As yet, the Second Circuit has not ruled on the petition.

prohibiting the City from interfering with homeless people spending the nights on the Church steps, provided that nothing in the order "shall limit the authority of the New York City Police Department to arrest any person for other conduct that is unlawful."

JURISDICTION

The Second Circuit issued the judgment from which the City seeks certiorari on April 26, 2006. This Court has jurisdiction to review this judgment under 28 U.S.C. §1254.

STATEMENT OF THE CASE

A. The underlying facts.

The Church is located at the corner of Fifth Avenue and 55th Street in Manhattan. For approximately the last 20 years the Church has operated a homeless shelter within its church house. This facility, which the Church refers to as its "formal homeless shelter," provides indoor sleeping accommodations for 10 homeless people a night.

In addition to its indoor facility, the Church, in February 1999, delimited two areas on its outdoor property where "Homeless Neighbors" permitted to sleep. The first of these areas included the landings at the top of the stairs leading into the Church's main sanctuary on Fifth Avenue at the corner of 55th Street. The second area was a strip of Church-owned property, extending into the sidewalk along the southern wall of the Church building.

According to the Church's guidelines, individuals who plan to spend the night on the steps "may not arrive to set up their sleeping places until 7:00 p.m. at night, and are required to leave no later than 7:00 a.m. each morning." The Church makes no toilet facilities available to the "Homeless Neighbors" in the course of the night. Such facilities within the Church building may be used by the homeless only during the daytime hours of 5:30 a.m. to 9:30 p.m. Nor does the Church provide any sort of security supervision to the homeless individuals spending the night on its steps.

The Church describes its services to the homeless as part of its religious ministry. It characterizes the presence of homeless persons sleeping outside its doors, unprotected and without access to any toilets or sanitary facilities, as "a kind of crèche scene, telling the world that the poor and homeless are welcome and not forgotten in the midst of a world that is deeply concerned with prosperity."

On or about November 28, 2001, the City notified the Church informally that it would no longer permit homeless persons to sleep on exterior Church property. On the nights of December 4, 11, and 12, 2001, the police removed individuals who were sleeping outside the Church. To avoid confrontation, the Church advised those who usually slept outside its building not to return on the evening of December 13, 2001.

At a hearing in the United States District Court for the Southern District of New York, held on the following day, December 14, 2001, the parties agreed that the homeless would be permitted to sleep outside the Church without interference until the Church and other plaintiffs had the opportunity to file an action on December 17.

B. The complaint.

On December 17, 2001, plaintiffs commenced the action underlying this appeal by filing a complaint in the United States District Court for the Southern District of New York. This complaint was subsequently superseded by an "Amended Complaint for Injunctive and Declaratory Relief," dated March 14, 2002.

The amended complaint asserted six claims, seeking redress: (1) under 42 USC § 1983; (2) under the First Amendment to the United States Constitution; (3) for common law trespass; (4) under the Religious Land Use and Institutionalized Persons Act of 2000; (5) for deprivation of due process; and (6) for violation of the New York State Constitution, Article 1, Section 3. FAPC seeks a temporary restraining order, a preliminary injunction, and a permanent injunction "prohibiting the Defendants from enforcing the New Policy and removing the Homeless Neighbors from the Church's property or with the right of the Church to promote its Hospitality Program" (A).

C. The temporary restraining order.

On December 19, 2001, following a hearing, the District Court (McKenna, J.) issued a temporary restraining order in favor of plaintiffs, barring the City from dispersing the homeless encampment on the Church steps pending further hearings (A1).

D. The preliminary injunction.

By memorandum and order, dated January 4, 2002, the District Court (McKenna, J.) granted the preliminary injunction sought by plaintiffs to the extent of prohibiting the City from interfering with those homeless people sleeping on the Church steps, above sidewalk level, providing that nothing in its order "shall limit the authority of the New York City Police Department to arrest any

person for other conduct that is unlawful" (A25). The District Court, however, denied so much of the application for a preliminary injunction as sought to allow homeless persons to sleep on Church property at sidewalk level (A25).

E. The affirmance of the preliminary injunction by United States Court of Appeals for the Second Circuit.

In an opinion and order dated June 12, 2002, the Court of Appeals for the Second Circuit affirmed the District Court order (A27). Fifth Avenue Presbyterian Church v. City of New York, 293 F3d 570 (2nd Cir. 2002). The Second Circuit held "the Church has demonstrated a likelihood of success in establishing that its provision of outdoor sleeping space for the homeless effectuates a sincerely held religious belief and therefore is protected under the Free Exercise Clause" (A38). In addition, the Second Circuit stated, it "assume[d], without deciding, that the City's actions in dispersing the homeless substantially burden the Church's protected religious activity . . ." (A38-39). Citing Church of Lukumi Babalu Aye v. City of Hialeah, 580 US 520, 546 (1993) and Wisconsin v. Yoder, 406 US 205, 214-15 (1972). the Second Circuit concluded that "absent a demonstration that a neutral law of general applicability justifies the City's actions, the City must assert a compelling interest in preventing the homeless from sleeping on Church property that would suffice to overcome the Church's free exercise rights, and that the means it has adopted to fulfill that interest are narrowly tailored" (A39).

The Second Circuit also declined to consider the City's argument that the Church's outdoor encampment violates the New York City Zoning Resolution: "Because this argument was not raised below and refusing to consider it will not result in "manifest injustice" in light of the posture of the case, and because adjudication of zoning disputes over accessory uses entails an inherently factual inquiry. [citations omitted], we decline to consider the City's argument here." (A42).

F. Discovery.

A period of discovery ensued. The evidence produced revealed an ongoing pattern of anti-social behavior occurring at the overnight encampment on the Church steps.

The Church acknowledged having had problems with individuals in its overnight encampment panhandling, playing loud music, engaging in disruptive behavior, and using foul language. According to the Church, such problems occur approximately once a week. Despite the frequency of these incidents, the Church provides no security or supervision for the individuals in the encampment.

A representative of the Church also acknowledged sanitation problems on the steps of the Church resulting from the lack of toilet facilities. The Church is closed between 9:00 p.m. and 5:30 a.m. If one of the homeless individuals in the outdoor encampment has bathroom needs, that person must either find a all-night toilet or "use a small bottle or can" which is then emptied. The Church representative stated further that if bottles or cans will not suffice, what "homeless people do is they use newspaper and they fold it up . . . and they go and put it in the trash." On a few occasions human excrement has been found on the Church steps.

In addition, the City produced videotapes showing individuals on the Church steps at night apparently urinating and pouring urine into planters adjacent to the Church steps.

g. Motion and cross-motion for summary judgment.

By amended notice of motion dated September 2, 2003, the Church moved for a summary judgment order granting the relief sought in the amended complaint.

By notice of cross-motion dated September 26, 2003, the City moved for summary judgment in its favor.

H. District Court's Opinion granting a permanent injunction against the City.

By memorandum and order dated October 28, 2004, the District Court permanently enjoined the City "from entering onto the property of the plaintiff Fifth Avenue Presbyterian Church described below for the purposes of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property, provided that nothing in this order shall limit the authority of the New York City Police Department to arrest any person for other conduct that is unlawful, or from removing from Church property anyone who is present there without the consent of the Church, or from removing homeless persons from Church property during a winter alert officially declared by the New York City Department of Health" (A86).

On the issue, however, of whether the Church may invite homeless individuals to sleep on its property at sidewalk level, the District Court reaffirmed its original determination in favor of the City, and held again that the Church had failed to show that the City's sidewalk regulations are not applied in a neutral and generally applicable way (A85).

In its discussion of the merits, the District Court stated: "That the Church's practice of allowing homeless persons to sleep out-of-doors on its property is an 'exercise of sincerely held religious beliefs,' Fifth Avenue Presbyterian, 293 F3d at 574, cannot be seriously disputed" (A51)

The District Court also adopted the Church's contention that its Free Exercise rights are implicated by the City's actions, and that, consequently, those actions must be subject to strict scrutiny analysis. In the District Court's view, the City has failed to show that, in seeking to bar the outdoor encampment on the grounds of public nuisance, its actions are neutral and generally applicable (A66).

I. The Opinion of the United States Court of Appeals for the Second Circuit

In an unreported summary order, dated April 26, 2006, the Second Circuit affirmed the permanent injunction. The Second Circuit's determination hinged primarily on it conclusion that, in advancing a public nuisance justification for prohibiting the nightly encampment on the Church steps, "the City did not proffer any evidence that that the conduct endangers or injures anyone's health" (A 94).

Although the Second Circuit's decision did not further address the issue of whether the Church's maintenance of a nightly encampment on its steps constitutes protected religious expression, the City preserved that issue in its brief submitted on the appeal. The City there states: "As in its appeal of the District Court's order granting a preliminary injunction, the City continues to believe and contend that the maintenance of an outdoor encampment for the homeless without any provision of security or minimal amenities is not a valid expression of religious belief because it does not in any meaningful sense comport with the Church's professed religious intention to provide shelter. In the instant appeal, however, the City is constrained by this Court's holding to the contrary in its decision regarding the preliminary injunction. . . . .The City here restates its respectful disagreement with this Court's holding in order to preserve its argument for the purpose of further appeal."

With regard to its contention that the nightly encampment violates the New York City Zoning Resolution, the City's brief stated: "The City further here reiterates its contention that, since the maintenance of an outdoor encampment is not protected religious activity, it is not an accessory use exempt from zoning requirements."

REASONS FOR GRANTING THE PETITION

In its decision of June 12, 2002, the Second Circuit erred by holding that the Church's policy of having homeless people sleep outdoors on its steps is religious activity within the ambit of the First Amendment. We do not quarrel with the principle that actual service to the homeless may be part of a religious ministry. We vigorously dispute, however, the conclusion that a policy of having homeless people sleep outdoors, in a setting where they are exposed to the elements, lack toilet and other sanitary facilities, and are without any security protection, constitutes such service in any meaningful sense.

The Second Circuit in this case has gone beyond the well established doctrine of Thomas v. Review Board of the Indiana Employment Security Division, 450 US 707, 715 (1981) and its progeny, which preclude an in inquiry into the consistency and rationality of a professed religious doctrine. The Church's doctrine is plain, undisputed, and, most people would agree, entirely admirable. That doctrine is that the Church is under a religious obligation to provide service to the needy and homeless. While properly avoiding any inquiry into the doctrine, the Second Circuit has chosen not to into the correlation of the doctrine and the Church's activity. If a religious body were to have a practice of punching homeless people in the face and then justifying that conduct on the ground of a religious obligation to provide shelter, the objective disjuncture between the undisputed doctrine and the activity purportedly implementing that doctrine should be enough to keep the religious body from cloaking itself in the mantle of constitutional protection. We submit that such a disjuncture exists under the present facts. The Second Circuit decision sets a precedent in that it enables a religious body to propound a doctrine and then, in the name

of that doctrine engage in activity to which that doctrine has no perceptible relation.

The practical effect of the Second Circuit holding that maintenance of the encampment is protected religious activity is to preclude the City from receiving a full hearing on its contention that the encampment violates the City's zoning provisions. As will be shown, the encampment may be found to be a zoning violation only if it is not constitutionally protected activity. Accordingly, the determination as to whether the encampment is protected religious conduct is significantly consequential in this case.

Constitutionally protected activity.

It is not disputed that the provision of shelter is a permissible accessory use of the Church, under § 12-10 of the New York City Zoning Resolution.[2] But to state that the provision of shelter and of services to the homeless are legitimate religious activities brings one no closer to a definition either of "shelter" or of "services." We submit that the use of the Church's steps as a place for the homeless to sleep falls under neither category.

An equitable standard for minimally habitable shelter has been stated by the New York state Court of Appeals. In McCain v. Koch, 70 NY2d 109 (1987) ("McCain"), that court found a basis in equity to hold that, absent other regulation, any emergency shelter provided to homeless persons as a matter of discretion by the New York City Departments of Social Services and Housing Preservation and Development must conform to "minimum

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[2] Section 12-10 of the Zoning Resolution defines "accessory use" as "a use conducted on the same zoning lot as the principle use to which it is related."

standards of sanitation, safety, and decency." Id. at 113. These standards, as stated by the New York State Supreme Court and affirmed by the State Court of Appeals, included, *inter alia*, a bed for each individual, a sufficient number of clean towels, access to a sanitary bathroom, sufficient heat, and locks on the outside doors of the facility. Id. at 115.

In affirming the New York Supreme Court, the State Court of Appeals cited the reasoning of the lower court that in "a civilized society, a 'shelter' which does not meet minimum standards of cleanliness, warmth, space and rudimentary conveniences *is no shelter at all.*" Id. at 119 [emphasis added by Court of Appeals]. The Court of Appeals then added its own observation that "in providing subminimum shelter the defendants were, in effect denying *any relief* to the homeless." Id. [emphasis in original].

While McCain, which deals with the City's obligation to meet certain standards when providing emergency housing, is not strictly binding in this case, its language does provide a useful reference point, highlighting the meaninglessness of the Church's assertion that the homeless encampment is a reflection of the Church's obligation "to practice compassion and provide hospitality to everyone who comes to us." To describe what the Church offers -- or more precisely does not offer – to its "Homeless Neighbors" at night as either "compassion" or "hospitality" is simply an abuse of English usage. It is language that has no perceptible relation to the actual physical reality it purports to describe and is, thus, tantamount to no religious justification at all. If a religious body were to subject homeless people to overt physical cruelty and abuse and then justify such conduct as protected religious practice based on "compassion" and "hospitality," the obviously empty rhetoric ought not be a basis for according that conduct the imprimatur of First Amendment protection. While we by no means accuse the

Church of practicing deliberate cruelty, we submit that the vast discrepancy between its rhetoric and the relevant circumstances renders the rhetoric insufficient to describe actual religious conduct.

The City is mindful of this Court's holding that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection." Thomas v. Review Board of the Indiana Employment Security Division, 450 US 707, 715 (1981). Unlike the instant case, however, the language in Thomas refers to a formulation of doctrine. The plaintiff in Thomas had been denied unemployment compensation because, based on his religious beliefs, he refused to participate in the production of armaments. This Court held that it would be improper to inquire into the consistency of his belief or whether it had a rational basis. In the instant case, by contrast, the doctrine espoused by the Church is unchallenged and clear: the Church sees itself as obligated to extend hospitality to the homeless and the needy. The Church proclaims no doctrine that the poor should be invited to spend the night in location lacking security, sanitary facilities, and protection from the elements. What is at issue is not the legitimacy of the Church's doctrine or religious belief but whether the maintenance of the nightly encampment is conduct that bears any perceptible relation to that doctrine,

The City submits that the doctrine, which is not subject to challenge, has no connection to the conduct in question and that, consequently, the conduct should not be afforded religious protection.

Zoning violations.

Were the Church's practice a legitimate religious function, it would fall under the zoning category of "accessory use," as does the indoor shelter facility that the

Church currently operates. Section 12-10 of the New York City Zoning Resolution sets forth a three-prong test for determining whether a use qualifies as accessory: first, it must be conducted on the same zoning lot as the principle use [§ 12-10(a)]; second, it must be "clearly incidental to and customarily found in connection with" the principle use [§ 12-10(b)]; and third, there must be unity of ownership between the principal and accessory uses [§ 12-10(c)]. "[E]ducational and religious institutions are generally entitled to locate on their property facilities for such social, recreational, athletic and other accessory uses as are reasonably associated with their educational or religious purposes." Lawrence School Corporation v. Lewis, 303 NY 484, 489 (1952). But because the use of the Church steps as a night-time encampment serves no actual religious function, it fails to quality as accessory use and is an improper use of Church property.

"Whether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question." New York Botanical Garden v. Board of Standards and Appeals, 912 NY2d 413, 419 (1998). Given the upscale commercial character of the corner of 55th Street and 5th Avenue, it should be self-evident that the use of the Church steps as a nightly sleeping encampment is no more appropriate in that neighborhood than a similar practice would be if the building in question were a museum or a hotel. Enforcement of the Zoning Resolution is a legitimate exercise of the City's police power. *See* Stringfellow's of New York v. City of New York, 91 NY2d 382, 395 (1998). Accordingly, the City has authority to clear the Church steps at night of those who would use it as a sleeping encampment.

In the appeal below, the Church has cited the Religious Land Use and Institutionalized Persons Act of 2000, 42 USC 2000cc ("RLUIPA"). The enforcement of the zoning rules is subject to strict scrutiny in this case only if those rules burden protected religious practice. Assuming that the City is correct that the maintenance of the nightly encampment has no such protected status, RLUIPA does not apply.

We also note that the Second Circuit declined to consider the issue of zoning violations because it had not been raised at the District Court level and because "adjudication of zoning disputes over accessory uses entails an inherently factual inquiry" (A). While it is true that normally the question of whether a specific use is properly an accessory one requires a fact-based inquiry, *see* New York Botanical Garden v. Board of Standards & Appeals, 91 NY2d 413, 420 (1998), the issue in this case is legal. Whether the nightly presence of homeless persons on the Church steps is protected religious conduct is a legal, not factual, question. If, as we contend, the maintenance of that encampment is not protected, the Church simply has no basis to assert that the encampment is a use accessory to the Church's principal religious function.

The imposition of criminal penalties against the Church for committing zoning violations would require notification and an administrative inquiry by the Commissioner of Buildings under § 71-10 of the Zoning Resolution. The underlying issue in this case, however, is not whether the Church should be subject to criminal penalties, but whether the police may be enjoined from clearing the steps to correct a zoning violation in progress. Because the nightly use of the steps as an encampment is a zoning violation, it constitutes a misdemeanor. "The owner, lessee or occupant of any building in which a violation of the zoning resolution has been committed or

shall exist, . . . or any other person who commits, takes part or assists in any such violation or who maintains any building in which any such violation shall exist, shall be guilty of a misdemeanor." N.Y.C. Administrative Code § 26-126(a). Authority to remedy the commission of a misdemeanor resides with the Police Department, which "shall have the power and it shall be their duty to preserve the public peace, . . . disperse unlawful or dangerous assemblages . . ., guard the public health, . . . enforce and prevent violation of all laws and ordinances in force in the city . . . ." New York City Charter § 435(a). We submit, therefore, that whether or not the Commissioner of Buildings chooses to take administrative action to penalize the Church for a zoning violation, the Police Department retains the authority to disperse the encampment. That authority is currently stymied by the Second Circuit order underlying this petition.

The facts in this case that bear on the zoning issue are not in dispute. No one denies that homeless persons use the Church steps as an encampment every night. Whether, under the Zoning Resolution, that occurrence is a legitimate use accessory to the Church's religious function is a question of law, not of fact. The zoning question was therefore appropriate for consideration by the Second Circuit, even though it had not been raised in the District Court. *See* Coogan v. Smyers, 134 F3d 479, 486-87 (2nd Cir. 1998); Chertkova v. Connecticut Gen. Life Insurance Co., 92 F3d 81, 88 (2nd Cir. 1996).

In sum, we respectfully request that this Court grant certiorari to consider the question of whether the Church's maintenance of a nightly encampment on its steps is protected religious activity. A decision in the City's favor on that issue prevent religious bodies from engaging, under cover of religious doctrine, in conduct that bears no perceivable relation to that doctrine. The concrete effect of

such a decision in the instant case would clear the way for consideration of whether the nightly encampment violates the City's zoning laws, a question that has so far eluded review.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

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July 24, 2006

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FIFTH AVENUE PRESBYTERIAN CHURCH, GLADYS ESCALERA, NICHOLAS NESRON, WILLIAM P. RASMUSSEN, DONALD J. ROBISON, VERONICA A. LESTER, ALFRED MCKENZIE, ALFRED BROWN, DENNIS PAIGE, PEABODY DENNIS, STEFAN PARY, and MARGARET SHAFER,

01Civ.11493 (LMM)

Plaintiffs,

-versus-

THE CITY OF NEW YORK, BERNARD KERIK, and RUDOLPH GIULIANI,

Defendants.

----------x

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE CONCERNING A PRELIMINARY INJUNCTION HEARING AND EXPEDITED DISCOVERY

This matter having come before the Court on the plaintiffs' application for a temporary restraining order, application for an order for expedited discovery, and application for expedited consideration of a motion for preliminary injunction and it appearing from the declaration of Margaret Shafer, which is attached to and

incorporated in the plaintiffs' application, that the plaintiffs are entitled to such relief, it is hereby

ORDERED that the defendants are temporarily restrained from entering onto the property of the plaintiff 5th Avenue Presbyterian Church for the purpose of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property, provided that nothing in this order shall limit the authority of the New York City Police Department to arrest any person for other conduct that is unlawful. For the purposes of this order, the portion of the plaintiffs' property at issue constitutes the three staircases that extend from the church towards Fifth Avenue, the two staircases that extend from the church towards 55th Street as well as the paved area that extends 5'2" feet from the exterior southern wall towards the curb at 55th Street. Nothing in this order shall permit any person to sleep on the City sidewalk that extends 13' feet from the curb of 55th Street toward the plaintiff church.

ORDERED that the defendants appear before the Honorable _____, a judge of this Court in the Federal Courthouse, 500 Pearl Street, New York, New York 10007 on _____the day of December 2001 at the hour

_____of a.m./p.m. and then show cause, if any there be, why this Court should not issue a preliminary injunction as requested in the complaint, and it is further

ORDERED that the defendants shall respond to the Plaintiffs' Request for the Production of Documents, dated December 17, 2001 (a copy of which is attached) by _____ a.m./p.m. on the _____ day of December 2001;

ORDERED that the defendants shall make available for deposition those persons designated by the plaintiffs in the Plaintiffs' First Notice of Depositions, dated December 17, 2001 (a copy of which is attached), at a time and place arranged by the parties but no later than 24 hours prior to the preliminary injunction hearing scheduled in this matter;

ORDERED that the defendants shall respond to the Plaintiffs' First Set of Interrogatories, dated December 17, 2001 (a copy of which is attached), by _____ a.m./p.m. on the day of December 2001;

ORDERED that by _____ a.m./p.m, on the_____ day of December 2001 the defendants shall file and serve on the plaintiffs by hand any papers they wish to file in

opposition to the plaintiffs' Motion for a Preliminary Injunction, and it is further

ORDERED that by _____ a.m./p.m on the_____ day of December 2001 the plaintiffs may file and serve on the defendants by hand any papers they wish to file in reply to the defendants' opposition to the plaintiffs' Motion for a Preliminary Injunction, and

ORDERED that the requirement of security, as specified by Rule 65(c) of the Federal Rules of Civil Procedure is hereby waived; and it is further

ORDERED that service of a copy of this order to show cause along with the complaint on the Corporation Counsel of the City of New York on or before _____shall constitute sufficient service to commence this action against all named defendants.

_____

UNITED STATES DISTRICT JUDGE

Dated: December 19, 2001
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

FIFTH AVENUE PRESBYTERIAN CHURCH, et al.,

01Civ.11493 (LMM)

Plaintiffs,

-v-

MEMORANDUM AND ORDER

THE CITY OF NEW YORK, BERNARD KERIK, and RUDOLPH GUILIANI,

Defendants.

----------x

McKENNA, D.J.

1.

Plaintiffs -- a religious corporation organized under the laws of New York which owns and operates a church at the corner of Fifth Avenue and 55th Street in Manhattan, New York City (the "Church"); Margaret Shafer, an employee and member of the church "employed as Associate for Outreach for the Church, and . . . a member of the Church who is personally and professionally engaged in the Church's program toward the homeless population" (Compl. ¶2); and ten homeless persons -- seek a preliminary injunction which, very briefly described, would prevent defendant The City of New York (the "City") from

dispersing from the Church's property homeless persons, sleeping at night with the permission of the Church on the Church's property, either in recessed entranceways to the church building, or within the sidewalk area belonging to the Church extending approximately five feet from the 55th Street side of the church building.[1]

2.

> Where . . . a moving party seeks a preliminary injunction to stay " 'government action taken in the public interest pursuant to a statutory or regulatory scheme,' " that party must show irreparable harm in the absence of an injunction and a likelihood of success on the merits. Violations of First Amendment rights "are commonly considered irreparable injuries for the purposes of a preliminary injunction."

Latino Office's Ass'n v. City of New York, 196 F.3d 458, 462 (2d Cir. 1999) (quoting New York Magazine v. Metropolitan Transp. Auth., 136 F.3d 123, 127 (2d Cir.) (quoting Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996)), cert. denied, 525 U.S. 824 (1998), and Bery v. City

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[1] On December 19, 2001, the Court granted a temporary restraining order in favor of plaintiffs. A hearing on the motion for a preliminary injunction was held on December 28, 2001, on which date the temporary restraining order was modified and extended as modified for 10 days.

of New York, 97 F.3d 689, 693 (2d Cit. 1996), cert. denied, 520 U.S. 1251 (1997); other citations omitted.) "[W]here the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme ... the less rigorous fair-ground-for-litigation standard" is not applicable. Plaza Health Labs., Inc, v. Perales, 878 F.2d 577, 580 (2d Cir. 1989); see also Jolly v. Coughlin, 76 F.3d at 473.

> The moving party must make a "clear" or "substantial" showing of a likelihood of success where (1) the injunction sought "will alter, rather than maintain, the status quo"-- i.e., is properly characterized as a "mandatory" rather than "prohibitory" injunction; or (2) the injunction sought "will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits."

Jolly, 76 F.3d at 473 (quoting Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 33-34 (2d Cir. 1995)).

3.

For some 15 years, the Church has operated a homeless shelter for 10 males in its church house. (Shafer Decl. ¶ 10.) Apart from that shelter, for a number of years homeless persons had chosen to sleep at night on the stairs

to entrances to the church building or on the ground next to the exterior walls of the church building. (Id. ¶ 11.) The Church refers to these persons as "Homeless Neighbors." (Id.)

> After years of informal toleration, the Church adopted a formal policy of hospitality and welcome toward the Homeless Neighbors in February, 1999. . . . Pursuant to that policy, and in furtherance of the Church's religious beliefs, the Church has developed a set of programs (the "Hospitality Program") intended to develop relationship with the Homeless Neighbors and to help to guide them off the streets and to reintegrate them into society in ways that serve their needs.

(Id. ¶ 15.) The Hospitality Program:

> a. Delimits two areas on Church property where Homeless Neighbors may sleep [described below].
>
> * * *
>
> b. Set strict hours for sleeping on Church property. Currently, Homeless Neighbors may not arrive to set up their sleeping places until 9:00 p.m. at night, and are required to leave no later than 7:00 a.m each morning.

c. Sets rules and regulations that the Homeless Neighbors are expected to observe . . . These regulations include restrictions on noise, language, and behavior, and provide that any materials used to provide overnight shelter are to be taken with them or deposited in a defined location for pickup by trash haulers each morning.

d. Provides toilet facilities in the Church building for use of the Homeless Neighbors within specified hours.

e. Employs a liaison person to meet each of the Homeless Neighbors, learn about the person's history and needs, and assist members of the Church to come to know the Homeless Neighbors and provide them with the encouragement and assistance they need to get on with their lives.

f. Organizes a steering committee of Church members to come to know the Homeless Neighbors, to recommend policy to the Church's governing boards concerning homelessness, and to develop Church programs to assist them.

g. Conducts luncheons, dinners, parties, and other opportunities for Church members and Homeless Neighbors to interact (the Church's "befriending ministry").

h. Assists Homeless Neighbors to take steps, make contacts, and to complete papers that make it possible for them to move off the streets, obtain necessary financial, medical and psychiatric assistance, and resume their productive lives.

(Id. ¶ 16.)

4.

The first of the areas in which the Church permits homeless persons to sleep at night is "the landings at the top of the stairs leading into the Church's main sanctuary on Fifth Avenue and at the corner of 55th Street" which "are contained within arched entryways, are recessed approximately five to ten feet from the sidewalk, and are raised approximately six feet above the level of the sidewalk, up flights of stairs that recede progressively inward into the Church sanctuary building as they rise." (Shafer Decl. ¶ 16.a.i.) The second is along the side of the

church building on 55th Street, an area easier to visualize from the new survey annexed as an exhibit to the December 27, 2001 Declaration of Thomas Piciocco. That survey, amending an earlier survey submitted by Mr. Piciocco, shows the Church property line along 55th Street to extend "between four feet, ten inches, and five feet, zero inches, from the southerly wall of the Church sanctuary building" (Piciocco Decl. ¶ 3), i.e., not from the most southerly points of the entrance structures or the buttresses on the 55th Street side of the building. The Church, prior to the new survey, had believed that property line to extend approximately six feet, seven inches, from the wall of the church building. (Shafer Decl. 16.a.ii.) The property line is marked out by tape, and the Church is moving the tape to correspond to the new survey. (Third Safer Decl. ¶ 3)[2] Reduction of the sidewalk area owned by the Church in conformity with the new survey reduces the number of

[2] What is not clear from the survey is whether the stairs of the entrances on the 55th Street side of the church building extend beyond the property line as shown in the new survey.

persons able to sleep in that area plus the entrances to about 22, according to plaintiffs.

5.

Since the Church began to permit homeless persons to sleep on its property, the City did not interfere with such persons doing so until quite recently. On or about November 28, 2001, the City informally advised the Church that homeless persons would no longer be permitted to sleep on exterior Church property. (Shafer Decl. ¶ 21.) On December 4, 2001, police came to the Church premises at about 2:00 A.M. and removed the homeless persons sleeping on or next to the exterior of the church building. (Id. ¶ 23.) On December 11, 2001, police came to the Church premises at about midnight, and removed the homeless sleeping on the 55th Street side of the church building (but not those sleeping on the steps on the Fifth Avenue side of the church building.) (Id., ¶¶ 26-27.) On December 12, 2001, police came to the Church premises prior to 9:30 P.M. and, according to Ms. Shafer, told the homeless persons present that they would have to leave or be arrested (id. ¶¶ 28-29), or, according to Sergeant Forsyth of the Police Department's Homeless

Outreach Unit, engaged in outreach efforts with the homeless without threat of arrest. (Forsyth Decl. ¶¶ 19-22.) Ultimately, the homeless persons left. (Shafer Decl. ¶ 33.) To avoid confrontation, the Church advised the homeless not to come to the Church premises on the evening of December 13, 2001. (Id. ¶ 35.) When the parties appeared before the Part I Judge on December 14, 2001, they came to a "weekend 'stand-still' agreement allowing the Homeless Neighbors to stay on Church property without being removed until this action could be filed on December 17" (id.), which it was. On the nights of December 17-18 and 18-19, police came to the Church premises and required persons sleeping on the 55th Street side of the Church to remove any tents or cardboard boxes under which they were sleeping. (Shafer Second Decl. ¶¶ 19, 21.) On December 19, 2001, this Court issued a temporary restraining order in favor of plaintiffs.

Plaintiffs assert six claims, (i) under 42 U.S.C. § 1983, (ii) under the First Amendment to the United States Constitution, (iii) for common law trespass, (iv) under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000, et seq., (v) for deprivation of due process, and (vi) for violation of the New York State Constitution, Article 1, Section 3.

However, at this stage of the case at least, plaintiffs argue primarily from the Free Exercise Clause of the First Amendment. They say that "[f]irst and foremost, this remains a case about the right of the Fifth Avenue Presbyterian Church to allow homeless people to sleep on its private property as part of the Church's religious mission." (Pl. Mem. at 1.) The "decision to allow the homeless to sleep on its property is an integral part of the Church's religious work. This activity therefore is protected by the Free Exercise Clause of the First Amendment." (Id. at 6 (citations omitted).)

The Supreme Court has made it clear that, in free exercise cases, the "compelling state interest" test, Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S.

707, 718 (1981), does not apply in the case of a neutral, generally applicable law. "[Employment Div,. Dept, of Human Resources of Oregon v.] Smith (494 U.S. 872 (1990),) held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." City of Boerne v. Flores, 521 U.S. 507, 514 (1997).

"[T]he Church recognizes that its Free Exercise rights are not absolute" (Pl. Mem. at 8), and that "the government under Smith might well have the power to enforce general laws and regulations regulating use of Church property . . thus burdening the Church's ability to allow the homeless to sleep on that property." (Id. at 9.) Plaintiffs argue, however, that the government "first has to adopt such laws and regulations. Because the laws and regulations cited by the City do not regulate the activity at issue here, they can provide no legal justification for the burden imposed on the plaintiffs' Free Exercise rights." (Id. (footnote omitted).)

The City argues, in the first place, "that there is no exercise of religious beliefs in allowing the homeless to sleep on the sidewalk." (Def. Mem. at 5.) The City also

argues that plaintiffs are violating applicable law or regulation in four specific ways: first, because the Church, in allowing the homeless to sleep on its property, is operating a de facto shelter without State certification, in violation of regulations of the New York State Department of Social Services contained in NYCRR Title 18, Chapter II, Subchapter D; second, because, in allowing the homeless to sleep on Church property, the Church is creating a public nuisance; third, because the sidewalk on which the homeless sleep is subject to City regulation (even though privately owned), and the Police Department "has determined that 35-40 people sleeping on the sidewalk is an unacceptable condition; it is both dangerous to the health and welfare of the homeless who are sleeping there and interferes with the public's use of the area." (Def. Mem. at 15); and, fourth, the use by the homeless of "boxes, tents and similar material" (id, at 17) violates N.Y.C. Administrative Code § 16-122(b). The Court considers these arguments in order.

The Court does not concur in the City's argument that the Church, in permitting homeless persons to sleep on its property, is not acting according to the tenets of its faith.

In the first place, "[i]t is impermissible for the Court to evaluate the centrality of a religious practice or belief to a person's religion." Al-Amin v. City of New York, 979 F. Supp. 168, 171 (E.D.N.Y. 1997) (citing Smith, 494 U.S. at 887, and Thomas, 450 U.S. at 716).

The Court also notes that services to the homeless have been judicially recognized as religious conduct, within the ambit of the First Amendment. See Stuart Circle Parish v. Board of Zoning Appeals, 946 F. Supp. 1225, 1236-37 (E.D. Va. 1996), and Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538, 544 (D.D.C. 1994).[3] Stuart Circle and Western Presbyterian involved programs for feeding the homeless, however, and

[3] The Court recognizes that Stuart Circle and Western Presbyterian were decided, in part, under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000b, et seq., before that statute was invalidated by the Supreme Court in City of Boerne, and that the "compelling governmental interest" standard of review reflected in that statute does not now apply.

the City urges that that must be distinguished from allowing the homeless a place to sleep. That argument, however, is not persuasive. It is no doubt true that the personnel involved in the Church's Hospitality Program are not actively interacting with the homeless while the latter are asleep, but, as Ms. Shafer explains, allowing the homeless to sleep on Church property encourages their regular presence, and so fosters trust and friendship between the homeless and Church personnel, which then enables the Church to work with the homeless and, in some cases, to better their situation. (Second Shafer Decl. ¶ 10-12.)[4]

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[4] Ms. Shafer states that "[s]ince January, 2001, the Church has assisted at least 77 persons who have been, at one time or another, its Homeless Neighbors, to move off the streets and into more permanent housing or other situations where their individual problems and needs receive professional attention." (Shafer Decl. ¶ 17.) The City and the Church appear to agree that at least many of the homeless are "service resistant" so that continued engagement is needed in order to break down mistrust as part of the process of bettering the conditions of the homeless. (See Forsyth Decl. ¶ 10, and Shafer Decl. ¶¶ 11-14; see also Markee Decl. ¶¶ 4-6.)

The permission given by the Church to homeless persons to sleep on its property does not create a de facto shelter in violation of the regulations of the N.Y. State Department of Social Services cited by the City. The City has cited no authority, or statement from the Department of Social Services, for this contention, and the relevant definition of a shelter very strongly suggests a facility operated within a structure, indoors.[5]

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[5] The regulations define a shelter for adults as follows:

> Shelter for adults shall mean an adult-care facility established and operated for the purpose of providing temporary residential care, room, board, supervision, information and referral, and where required by the department or otherwise deemed necessary by the operator, social rehabilitation services, for adults in need of temporary accommodations, supervision and services. Such definition shall not include facilities providing such temporary residential services to fewer than 20 persons, unless such facility is operated by a social services district.

18 NYCRR, Ch. II, Subch. D., Part 485, § 485.2(e).

The presence of the homeless on the Church's property cannot, on the record before the Court, be regarded as a public nuisance. In Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church, 550 N.Y.S.2d 981, 988 (N.Y. Sup. Ct. 1989), cited by the City (Def. Mem. at 11), the court said that a public nuisance

> consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.

(citations omitted).[6] "To sustain a cause of action sounding in public nuisance, the plaintiff must establish by clear and convincing evidence a substantial and unreasonable interference with the public right." DeStefano v.

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[6] In Greentree, involving a motion to temporarily enjoin the operation by a church of a homeless shelter brought by an adjacent condominium whose residents feared "crime, drug sales, prostitution and a diminution of property values," 550 N.Y.S.2d at 983, the court found that the plaintiffs had not adequately alleged a public nuisance. Id. at 988.

Emergency Housing Group, Inc., 722 N.Y.S.2d 35, 37, (N.Y. App. Div. 2001) (citations omitted).[7]

The record before the Court does not show that the activities of homeless persons given permission by the Church to sleep on its property have risen to the level of a public nuisance as defined in the case law. No arrests of any of such homeless persons for any reason are cited by the City. And, while the president of a condominium located on 55th Street has described, in general way, unpleasantnesses observed by him (McCoy Decl.), the descriptions are not very specific as to date or time or even as to frequency. While the presence of the homeless may, in a number of ways, be disturbing, their presence, as such, cannot be regarded as a public nuisance.

[7] The New York City Administrative Code contains a definition of "nuisance" (which it declares to be illegal) that includes "public nuisance, as known of common law or in equity jurisprudence." N.Y.C. Admin. Code § 17-142.

The City next argues that "[t]he sidewalk on which [the homeless] plaintiffs sleep is subject to City regulation" (Def. Mem. at 12), and that "private property is subject to the same regulations of public places if the private property is used by the public with the consent of the owners." (Id. at 13 (citing Fieldston Property Owner's Assn., Inc. v. Bianchi, 215 N.Y.S.2d 834 (N.Y. Sup. Ct. 1961), aff'd, 230 N.Y.S.2d 665 (N.Y. App. Div. 1962), aff'd 241 N.Y.2d 175 (1963)).) The City's power to regulate the sidewalks, the City further argues, is, under the City Charter, exerciseable by the Police Department, which has the power, among others, to "disperse ... assemblages which obstruct the passage of public streets, sidewalks, parks and places." N.Y.C. Charter § 435. "Under the broad powers granted by the charter, the [Police Department] has determined that 35-40 people sleeping on the sidewalk is an unacceptable condition; it is both dangerous to the health and welfare of the homeless who are sleeping there and interferes with the public's use of the area." (Def. Mem. at 16.)

The Court is now persuaded that, in essence, this argument is correct: the Police Department does have

authority to regulate those portions of the 55th Street sidewalk that are owned by the Church. The Church has not shown that that portion of the sidewalk on 55th Street that it owns is not, at the same time, a public place. The Court notes, however, that the City's argument, by its terms, applies only to the sidewalk which the City has shown that it can regulate, and not to the areas in the entranceways to the church building, raised above street level and thus not a part of the sidewalk, in which the Church has invited the homeless to sleep. The City has not shown that it can regulate these areas.[8]

11.

As a part of its power to regulate the sidewalk on 55th Street, the City can also enforce, in that area, the prohibition of N.Y. City Administrative Code against the erection on a public street of "any shed, building or other obstruction," N.Y.C. Admin. Code § 16-122(b), in the case of cardboard shelters constructed by the homeless for sleeping purposes. The Court is convinced by Judge

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[8] That is not to say, of course, that the Police Department cannot make arrests in those areas for crimes committed or attempted, as plaintiffs appear to concede.

Martin's decision in Betancourt v. Guiliani, 2000 WL 1877071, at *4 (S.D.N.Y. Dec. 26, 2000), appeal pending, that such structures, even though temporary, are within that prohibition. The prohibition of the cited provision, the Court notes, does not apply to the entranceways to the church building, raised above street level and thus not a part of the sidewalk, in which the Church has invited the homeless to sleep. Those areas are not part of "any marginal or public street or any public place." N.Y.C. Admin. Code § 16-122(b).

12.

Insofar as the Church permits homeless persons to sleep in the areas described in Paragraph 16.a.i of Ms. Shafer's December 17, 2001 declaration, the Church has made a substantial showing of likelihood of success on the merits of its claim under the Free Exercise clause of the First Amendment and that it will suffer irreparable harm, through deprivation of its First Amendment rights, absent the injunction sought, and the Church's motion for a preliminary injunction is therefore, to that extent, granted. (See Section 13 hereof, below.) The motion is otherwise denied.

13.

It is ORDERED that the defendants are preliminarily enjoined from entering onto the property of the plaintiff 5th Avenue Presbyterian Church described below for the purpose of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property, provided that nothing in this order shall limit the authority of the New York City Police Department to arrest any person for other conduct that is unlawful, or from removing from church property anyone who is present there without the consent of the Church, or from removing homeless persons from Church property during a winter alert officially declared by the New York City Department of Health. For the purposes of this order, the portion of the plaintiffs' property at issue constitutes the three staircases that extend from the Church building towards Fifth Avenue, and the two staircases that extend from the Church building towards 55th Street.[9]

[9] The temporary restraining order is dissolved.

SO ORDERED.

Dated: January 4, 2002
Issued: 3:48 p.m.

Lawrence M. McKenna
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2001

Argued: May 29, 2002 Decided: June 12, 2002

Docket No. 02-7073

FIFTH AVENUE PRESBYTERIAN CHURCH, GLADYS ESCALERA, NICHOLAS NESRON, WILLIAM P. RASMUSSEN, DONALD J. ROBISON, VERONICA A. LESTER, ALFRED MCKENZIE, ALFRED BROWN, DENNIS PAIGE, PEABODY DENNIS, STEFAN PARY AND MARGARET SHAFER,

Plaintiffs-Appellees-Cross-Appellants,

-v.-

THE CITY OF NEW YORK, BERNARD KERIK AND RUDOLPH GIULIANI,

Defendants-Appellants-Cross-Appellees.

Before:

STRAUB, SOTOMAYOR, *Circuit Judges*, and GOLDBERG, *Judge.**

Appeal from opinion and order of the United Stated District Court for the Southern District of New York (Lawrence M.

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* The Honorable Richard W. Goldberg, United States Court of International Trade, sitting by designation.

McKenna, *Judge*) entering a preliminary injunction in favor of Plaintiffs-Appellees Fifth Avenue Presbyterian Church, *et. al.* preventing Defendant-Appellant City of New York from dispersing homeless individuals who are sleeping by invitation on the Church's landings and steps.

The decision of the District Court is AFFIRMED.

CARTER G. PHILLIPS, Sidley Austin Brown & Wood L.L.P., Washington, D.C. (James D. Johnson, Gene C. Schaerr, Edward McNicholas, James C. Stansel, Patrick F. Linehan on the brief), for *Plaintiffs-Appellees-Cross-Appellants.*

JONATHAN R. NELSON, New York, N.Y., on the brief for *Plaintiffs-Appellees-Cross-Appellants.*

KATHERINE PRINGLE, Friedman, Kaplan, Seiler & Adelman, New York, N.Y., on the brief for *Plaintiffs-Appellees-Cross-Appellants.*

MORDECAI NEWMAN, for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, N.Y. (Leonard Koerner,

Larry A. Sonnenshein, Rachel Goldman on the brief), for *Defendants-Appellants-Cross-Appellees.*

TIMOTHY K. ARMSTRONG AND CANDACE N. BECK, Howrey Simon Arnold & White L.L.P., Washington, D.C. (Maria Foscarinis, National Law Center on Homelessness & Poverty, of counsel), on the brief for *amicus curiae The National Law Center on Homelessness & Poverty*

ARNOLD S. COHEN, WARREN B. SCHARF AND JONATHAN L. HAFETZ, New York, N.Y., on the brief for *amicus curiae The Partnership for the Homeless.*

KATHRYN TABNER, Shearman & Sterling, New York, N.Y. (Douglas H. Lasdon, Urban Justice Center, of counsel), on the brief for *amicus curiae Urban Justice Center.*

ERIC W. TREENE, The Becket Fund for Religious Liberty, Washington, D.C. Anthony R. Picarello, Jr., Roman P. Storzer, Derek Gaubatz, of counsel), on the *brief for amici curiae The Baptist Joint Committee on Public Affairs; The Becket Fund*

for Religious Liberty; The Christian Legal Society, Clifton Kirkpatrick As Stated Clerk of the General Assembly of the Presbyterian Church (USA); The Council of Churches of the City of New York; The General Conference of Seventh-Day Adventists; The Interfaith Assembly on Homelessness and Housing; The Queens Federation of Churches; and Rutgers Presbyterian Church.

STRAUB, *Circuit Judge*:

Defendants-Appellants the City of New York, Bernard Kerik and Rudolph Giuliani (collectively "the City") appeal from an opinion and order of the United States District Court for the Southern District of New York (Lawrence M. McKenna, *Judge*) entering a preliminary injunction in favor of Plaintiffs-Appellees Fifth Avenue Presbyterian Church ("Presbyterian" or "the Church") and ten homeless persons. Finding that Presbyterian had demonstrated a likelihood of success on the merits of its claim under the Free Exercise Clause of the First Amendment, the District Court entered a preliminary injunction preventing the City from dispersing homeless

individuals sleeping by invitation on the Church's landings and steps. We affirm.

BACKGROUND

Presbyterian is located at the corner of Fifth Avenue and 55th Street in Manhattan. For several years, homeless persons have chosen to sleep on the Church's outdoor property. In February 1999, the Church officially designated two areas on its outdoor property upon which homeless persons are permitted to sleep at night. The first of these areas encompasses the landings at the tops of the staircases leading into the Church's main sanctuary on Fifth Avenue and into its 55th Street entrance. The landings are contained within arched entryways and are recessed approximately five to ten feet from the sidewalk and raised approximately six feet above the sidewalk. The second designated area is a strip of land adjacent to the Church's southern wall that extends approximately five feet to the public sidewalk.

The Church views its outdoor space as a sanctuary for the service-resistant homeless who prefer not to sleep in shelters. Homeless persons are welcome on the Church's outdoor property between 8:00 p.m. and 7:00 a.m. They are

not permitted to set up their sleeping area or lie down until 9:00 p.m. Persons taking advantage of the Church's invitation to sleep on its outdoor property are given a list of rules, which includes instructions to clean up after themselves and a prohibition on begging, loud music, disruptive behavior, and foul language.

In November 2001, the City notified Presbyterian that it would no longer permit the homeless to sleep on the Church's outdoor property. Thereafter, on three occasions in early December 2001, city police removed the homeless from the Church's property during the night. Presbyterian claims that the police threatened the homeless with arrest if they refused to leave.

On December 17, 2001, Presbyterian brought suit under 42 U.S.C. § 1983, the First Amendment, the common law of trespass, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq.*, and for deprivation of due process and violation of Article 1, Section 3 of the New York State Constitution. Presbyterian sought injunctive relief preventing the City from entering onto Church property and dispersing the homeless. Focusing primarily on the

Church's cause of action under the Free Exercise Clause of the First Amendment, the City argued that allowing the homeless to sleep on the sidewalk and on Church grounds does not constitute protected religious activity, and that the Church had violated applicable laws or regulations in four ways: (1) operating a shelter without a license; (2) creation of a public nuisance; (3) allowing persons to sleep on a sidewalk that is subject to City regulation; and (4) allowing the use of boxes, tents, and similar materials on the sidewalk in violation of City codes.

Following a hearing, the District Court issued a memorandum and order granting in part the Church's request for a preliminary injunction. In ruling on the Church's application, the District Court concluded that allowing homeless persons to sleep on the Church's private property constitutes protected religious activity because doing so enables the Church to interact with and assist the homeless in bettering their lives. The court rejected the City's arguments that the Church is operating a *de facto* shelter, and that the presence of the homeless amounts to a public nuisance. The court agreed with the City that it is permitted to regulate the presence of sleeping persons, as

well as cardboard shelters and tents, on the Church's land adjacent to the sidewalk on 55th Street. Accordingly, the District Court entered a preliminary injunction prohibiting the City from interfering with homeless persons who are sleeping on the Church steps and landings above sidewalk level. The court denied the application with regard to those sleeping on Church property adjacent to the public sidewalk.[1]

DISCUSSION

On appeal, the City argues that the District Court erred in holding that the Church's outdoor sanctuary constitutes protected religious activity because allowing the homeless to sleep outdoors is an inadequate provision of shelter "in a civilized society." The City also renews its argument that the Church is operating a de facto shelter without valid registration and without adequate services and facilities. The City argues for the first time on appeal that it has the power to enforce minimum standards of habitability for unregulated shelters, and that the Church is

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[1] The Church originally filed a cross-appeal challenging the District Court's ruling with respect to the land adjacent to the sidewalk, but later withdrew that appeal.

in violation of local Zoning Resolution Section 12-10. The City also asserts for the first time that it has a compelling interest in dispersing the homeless from Presbyterian's grounds.

A district court's grant of a preliminary injunction is reviewed for abuse of discretion. *See Latino Officers Ass'n v. City of New York*, 196 F.3d 458, 462 (2d Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000). In order to merit preliminary injunctive relief against "government action taken in the public interest pursuant to a statutory or regulatory scheme," a plaintiff must show "irreparable harm in the absence of an injunction and a likelihood of success on the merits." *Id.* (internal quotation marks omitted).[2] "Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction." Id. (internal quotation marks omitted).

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[2] We reject the City's contention that the plaintiffs were required to meet the "clear or substantial likelihood of success" standard applicable to mandatory injunctions. *See Beal v. Stern*, 184 F.3d 117, 122-23 (2d Cir. 1999). The injunction appealed from does nothing more than preserve the status quo pending trial, and therefore no heightened showing was required.

"The Free Exercise Clause of the First Amendment, which has been applied to the states through the Fourteenth Amendment, provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny. *See id.* at 546; *see also Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye*, 508 U.S. at 546 (internal quotation marks omitted). Where the government seeks to enforce a law that is neutral and of general applicability, however, then it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices. *See id.* at 531; *Employment Div., Dep 't of Human Res. of Oreg. v. Smith*, 494 U.S. 872, 878-79 (1990).

Because "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires," courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists. *Smith*, 494 U.S. at 886-87. As such, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981); *see also Patrick v. Lefevre*, 745 F.2d 153, 156-57 (2d Cir. 1984). An individual claiming violation of free exercise rights need only demonstrate that the beliefs professed are "sincerely held" and in the individual's "own scheme of things, religious." *Lefevre*, 745 F.2d at 157 (internal quotation marks omitted); *see also Thomas*, 450 U.S. at 716.

Although the City concedes that the Church's provision of services to the homeless falls within the ambit of protected activity under the Free Exercise Clause, the City argues that allowing homeless persons to sleep outside is not a meaningful provision of "services" and does not

constitute legitimate religious conduct. Presbyterian responds that its outdoor sanctuary forms an integral part of its religious mission and that the police's removal of the homeless interferes with the Church's ministry and homeless outreach program. In an affidavit submitted in support of the application for injunctive relief, the Church's homeless liaison states that the Church is "commanded by scripture to care for the least, the lost, and the lonely of this world" and in ministering to the homeless, the Church is "giving the love of God . . . . There is perhaps no higher act of worship for a Christian."

We agree with the District Court that on the present record, the Church has demonstrated a likelihood of success in establishing that its provision of outdoor sleeping space for the homeless effectuates a sincerely held religious belief and therefore is protected under the Free Exercise Clause. *Cf. Stuart Circle Parish v. Bd. of Zoning Appeals of the City of Richmond*, 946 F. Supp. 1225, 1236 (E.D. Va. 1996); *Western Presbyterian Church v. Bd. of Zoning Adjustment of the District of Columbia*, 862 F. Supp. 538, 544-46 (D.D.C. 1994). Further, we assume, without deciding, that the City's actions in dispersing the

homeless substantially burden the Church's protected religious activity, a proposition with which the City has not argued. Accordingly, absent a demonstration that a neutral law of general applicability justifies the City's actions, the City must assert a compelling interest in preventing the homeless from sleeping on Church property that would suffice to overcome the Church's free exercise rights, and that the means it has adopted to fulfill that interest are narrowly tailored. *See Church of Lukumi Babalu Aye*, 508 U.S. at 546; *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972).

The City points to several laws or polices that it claims support its actions. First, the City argues that Presbyterian is operating a homeless shelter without a license and in contravention of state regulations. Pursuant to 18 N.Y.C.R.R. §§ 485.1 & 491.1, the operator of a shelter for adults must obtain certification from the New York State Department of Social Services and comply with its applicable regulations. A shelter is defined as "an adult care facility established and operated for the purpose of providing temporary residential care, room, board, supervision, information *and* referral ...." Id. § 491.2

(emphasis added). We agree with the District Court that an invitation to the homeless to sleep on outdoor property does not fall within the ambit of these regulations, which contemplate an indoor facility and the provision of comprehensive social services for the homeless. *See, e.g., id.* § 491.10 (setting forth detailed requirements for shelters pertaining to building and fire codes, furniture, amenities and housekeeping).

As an alternative justification for its actions, the City argues that it is empowered to enforce minimum standards of habitability for privately-run shelters in the absence of applicable regulations. In support of this proposition, the City cites the New York Court of Appeals' decision in *McCain v. Koch*, 70 N.Y.2d 109 (1987). *McCain* held that the New York Supreme Court has the equitable power to require a minimum standard of care for city-run emergency housing so long as the standard of care does not conflict with applicable state or city regulations. *McCain's* holding was premised on the principle that once the City has undertaken to provide emergency housing, it has a duty to ensure certain minimum standards of habitability. *Id.* at 119-20. We decline to extend *McCain's*

holding beyond the context of government-administered housing on these facts. Moreover, *McCain* addressed *a court's* equitable power to issue an injunction requiring the City to provide particular amenities; it did not address the City's power to devise and enforce equitable standards of its own making. Nor did the Court of Appeals in *McCain* express any opinion as to the substance of the injunction in that case — *i.e.*, whether the specific requirements in that injunction were in fact the minimum acceptable standards of habitability for a shelter.

The City argues that its power to enforce equitable standards of care for homeless shelters derives from its ability to enforce public nuisance laws. The District Court ruled below that the City had not established the existence of a nuisance, and the City does not challenge that particular holding on appeal. Therefore, we need not consider this argument. The City also claims, in its reply brief, that it has a "policy of regarding the provision of subminimal shelter as a nuisance." Not only is this argument untimely raised, *see Thomas v. Roach*, 165 F.3d 137, 145-46 (2d Cir. 1999), but the City has not adequately

demonstrated the existence or general applicability of such a policy, or that it applies to the Church's activities.

Finally, the City argues for the first time on appeal that the Church is in violation of New York City Zoning Resolution Section 12-10 because its outdoor sanctuary is not a permissible "accessory" use of its property. Because this argument was not raised below and refusing to consider it will not result in "manifest injustice" in light of the posture of the case, and because adjudication of zoning disputes over accessory uses entails an inherently factual inquiry, *see New York Botanical Garden v. Bd. of Standards & Appeals*, 91 N.Y 2d 413, 420 (1998), we decline to consider the City's argument here. *See Coogan v. Smyers*, 134 F.3d 479, 486-87 (2d Cir. 1998). Nor, therefore, need we express any opinion on the plaintiffs' argument, also raised for the first time on appeal, that the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq.*, subjects the City's application of its Zoning Resolution to strict scrutiny.

Thus, at the present time, the City has not sufficiently shown the existence of a relevant law or policy

that is neutral and of general applicability, and that would therefore justify its actions in dispersing the homeless from the Church's landings and steps. For the first time in its reply brief, the City argues that its dispersal of the homeless from Presbyterian's property is justified by a compelling state governmental interest, namely, "preventing the Church from providing inadequate shelter nightly and encouraging homeless persons to avoid a safer, more civilized alternative." Although arguments raised for the first time in a reply brief need not be considered, *see Thomas*, 165 F.3d at 145-46, we note that the homeless who take advantage of the Church's offer, ten of whom are plaintiffs in this action, do so voluntarily. Moreover, common sense, in addition to evidence put forth by the homeless plaintiffs, suggests that the majority of these homeless will not go to shelters if the City is permitted to disperse them; rather, they will find another place on the street upon which to sleep. Thus, it is doubtful that the "ends" support the City's "means," nor has the City attempted to show that police dispersal in the middle of the night is the least restrictive means of accomplishing its goal

of ensuring that the homeless have appropriate sleeping quarters. *See Yoder*, 406 U.S. at 215.

For the foregoing reasons, we find that the District Court did not abuse its discretion in concluding that Presbyterian has demonstrated a likelihood of success on the merits of its free exercise claim. The opinion and order of the District Court entering a preliminary injunction in favor of Presbyterian is hereby AFFIRMED.

United States Court Of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of June, two thousand and two.

Before: Hon. Chester J. Straub,
Hon. Sonia Sotomayor,
Circuit Judges.
Hon. Richard W. Goldberg*,
Judge..

Docket No. 02-7073

FIFTH AVENUE PRESBYTERIAN CHURCH, GLADYS ESCALERA, NICHOLAS NESRON, WILLIAM P. RASMUSSEN. DONALD J. ROBISON, VERONICA A. LESTER, ALFRED MCKENZIE, ALFRED BROWN, DENNIS PAIGE. PEABODY DENNIS, STEFAN PARY AND MARGARET SHAFER,

Plaintiffs-Appellees-Cross-Appellants,

V.

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* The Honorable Richard W. Goldberg, United States Court of International Trade, sitting by designation.

THE CITY OF NEW YORK, BERNARD KERIK AND RUDOLH GIULIANI,

Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by

Arthur M. Heller
Administrative Attorney

* The Honorable Richard W. Goldberg, United Sttes Court of International Trade, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FIFTH AVENUE PRESBYTERIAN CHURCH, et al.,

01 Civ. 11493 (LMM)

Plaintiffs,

-against-

MEMORANDUM AND ORDER

THE CITY OF NEW YORK, BERNARD KERIK, and RUDOLPH GIULIANI,

Defendants.

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McKENNA, D.J.

Plaintiffs -- a religious corporation which owns and operates a church at the corner of Fifth Avenue and 55th Street in Manhattan, New York City (the "Church"); Margaret Shafer, "employed as Associate for Outreach for the Church, and . . . a member of the Church who is personally and professionally engaged in the Church's program toward the homeless population" (Compl. ¶ 2); and ten homeless persons -- brought this action to obtain a permanent injunction preventing the City of New York (the

"City")[1] from dispersing homeless persons sleeping, at the Church's invitation, in the landings at the tops of the staircases leading up into the Fifth Avenue and the 55th Street entrances to the Church (contained within arched entryways and recessed about five to ten feet from the sidewalk and raised about six feet above the sidewalk) and on the Church's property along 55th Street adjacent to the Church wall (extending about five feet into the public sidewalk), as well as for a declaration that the dispersal of such persons from such areas has violated plaintiffs' rights.

1.

Homeless persons had been sleeping in the areas described above for some time when, in February 1999, they were officially designated by the Church as places where the homeless might sleep at night. In November of 2001, however, the City notified the Church that it would no longer permit the homeless to sleep on the Church's outdoor property described above, and on three occasions

[1] The City's former Mayor and Police Commissioner are named as defendants; the officials presently holding those positions have not been substituted.

in early December of 2001, the police removed the homeless from the Church's property during the night.

By Memorandum and Order dated January 4, 2002 ("January 4, 2002 Order"), the Court granted a preliminary injunction against defendants, against their

> entering onto the property of the plaintiff 5th Avenue Presbyterian Church . . . for the purpose of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property, provided that nothing in this order shall limit the authority of the New York City Police Department to arrest any person for other conduct that is unlawful, or from removing from church property anyone who is present there without the consent of the Church, or from removing homeless persons from Church property during a winter alert officially declared by the New York City Department of Health.

(January 4, 2002 Order at 17.) The injunction was limited, however, to the staircases. (Id. at 17-18.) The Court of Appeals affirmed the January 4, 2002 Order. Fifth Avenue Presbyterian Church v. City of New York, 293 F.3d 570 (2d Cir. 2002).

2.

Plaintiffs move, and defendants cross-move, for summary judgment. Under Fed. R. Civ. P. 56,

> Summary judgment is appropriate when, after reviewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A dispute is not "genuine" unless "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Nabisco, Inc. v. Warner-Lambert Co., 220 F.3d 43, 45 (2d Cir. 2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); other citation omitted).

> The burden of showing that no genuine factual dispute exists rests upon-the moving party, and in assessing the record to determine if such issues do exist, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. This remedy that precludes a trial is properly granted only when no rational finder of fact could find in favor of the non-moving party.

Carlton v. Mystic Transp., Inc., 202 F.3d 129, 133-34 (2d Cir. 2000) (citations omitted).

The Court considers plaintiffs' motion first.

3.

Plaintiffs' principal claim is that the City's actions in removing homeless persons from the Church's property (the "City's actions") have violated their rights under the

Free Exercise Clause of the First Amendment to the United States Constitution.

> "The Free Exercise Clause of the First Amendment, which has been applied to the states through the Fourteenth Amendment, provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' " Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny. "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." Where the government seeks to enforce a law that is neutral and of general applicability, however, then it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices.

Fifth Avenue Presbyterian, 293 F.3d at 574 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 546 (1993); other citations omitted).

That the Church's practice of allowing homeless persons to sleep out-of-doors on its property is an "exercise of sincerely held religious beliefs," Fifth Avenue Presbyterian, 293 F.3d at 574, cannot be seriously disputed.

See Declaration of Margaret Shafer, June 27, 2003, "Shafer Decl.," ¶¶ 7-10, 60-70; Declaration of Dr. Larry Rasmussen (Reinhold Niebuhr Professor of Social Christian Ethics at Union Theological Seminary), Mar. 26, 2003, ¶¶ 3-12; and Rule 56.1 Statement of Uncontested Facts in Support of Plaintiffs' Motion for Summary Judgment, "Pl. 56.1 Rule Stmt." ¶¶ 11-20 (not disputed in Defendants' Response to Plaintiffs' Local Rule 56.1 Statement).

Defendants argue that "[t]he mere act of permitting, or of not objecting to, a de facto shelter on [the Church's] property from 9:00 pm to 5:30 am does not rise to the level of a sincerely held religious belief that implicates First Amendment free exercise clause protection" because, during the hours in question, the Church "is obviously not ministering to any one since no one from [the Church] is present, and since most, if not all of, the individuals on the steps of [the Church] are sleeping." (Def. Mem. at 8 (footnote omitted))[2] The argument, in the first place, is too

[2] Defendants repeatedly refer to plaintiffs' activities as constituting a "de facto shelter," a terminology that does no more than muddy the argument. In allowing homeless persons to sleep out-of-doors on its property, the Church (Continued . . .)

narrow. See Shafer Reply Declaration, October 12, 1993, "Shafer Reply Decl." ¶ 28 ("Giving those persons a place to sleep at night is a central aspect of the Church's hospitality to them."). In the second place, the argument runs afoul of the rule that "courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists." Fifth Avenue Presbyterian, 293 F.3d at 574 (citing Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 886-87 (1990)).[3]

Defendants recognize that "[a]ssuming arguendo, that the plaintiffs have a sincerely held religious belief that implicates the First Amendment's free exercise clause,

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(. . . Continued)
has not created a shelter within any legal definition of the word. See Fifth Avenue Presbyterian, 293 F.3d at 575.

[3] Moreover, as the Court found in its January 4, 2001 Order: "services to the homeless have been judicially recognized as religious conduct, within the ambit of the First Amendment." See Stuart Circle Parish v. Board of Zoning Appeals, 946 F. Supp. 1225, 1236-37 (E.D. Va. 1996); Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538, 544 (D.D.C. 1994).

plaintiffs must next establish that the City's actions 'substantially burden the exercise of sincerely held religious beliefs.' " (Def. Mem. at 12 (quoting Fifth Avenue Presbyterian, 293 F.3d at 574)) Defendants do not -- it is hard to see how they could -- dispute that the Church's expression of its religious belief in allowing homeless persons to sleep out-of-doors on its property would be substantially burdened by police removing those persons from the Church's premises. Rather, defendants urge, that burden can be eliminated if the Church expands its indoor shelter, housing ten males (Shafer Decl., June 27, 2003, ¶ 10), cost being irrelevant because "there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.' " Goodall by Goodall v. Stafford County School Bd., 60 F.3d 168, 171 (4th Cir. 1995), cert. denied, 516 U.S. 1046 (1996) (quoting Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (plurality opinion)).

The cases defendants cite do not support their argument.[4] Adopting defendants' approach would subject plaintiffs to a far higher standard than is required by the Second Circuit's directive that demonstrating substantial burden is "not a particularly onerous task." McEachin v. McGuinnis, 357 F.3d 197, 202 (2d Cir. 2004); see also Ford v. McGinnis, 352 F.3d 582, 592-94 (2d Cir. 2003) (explicitly rejecting strict approach to substantial burden inquiry). A limited judicial inquiry is necessary because it respects the danger of undue judicial involvement in religious activity. See, e.g., Jolly v. Coughlin, 76 F.3d 468, 476 (2d Cir. 1996) (citations

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[4] Defendants cite cases with inapposite facts: the need for alternatives to prisoners' chosen religious practices due to safety concerns, Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995); Weir v. Nix, 114 F.3d 817 (8th Cir. 1997), the use of property not yet owned by a church, Daytona Rescue Mission, Inc. v. City of Daytona, 885 F. Supp. 1554 (M.D. Fla. 1995)(no burden in prohibiting foodbank on site church did not yet own), government subsidization of religious activity, Goodall, 60 F.3d 168 (no burden exists when government declines to subsidize) ; United States v. Any and All Radio Station Equipment, 93 F. Supp.2d 414 (S.D.N.Y. 2000) (government not required to allow broadcast of religious message without FCC license), and where no real modification of religious activity is required, Henderson v. Stanton, 76 F. Supp.2d 10 (D.D.C. 1999).

omitted). Thus, by necessity, "[o]ur scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature. An inquiry any more intrusive would be inconsistent with our nation's fundamental commitment to individual religious freedom." Id.

Finally, it is not clear as a factual matter that an expanded indoor shelter would provide the Church a commensurate alternative. The record indicates that some portion of the homeless persons who sleep on Church property do so because they are "service resistant," and would be as unlikely to stay in an indoor church shelter as in a City shelter. See, e.g., Fifth Avenue Presbyterian, 293 F.3d at 576 ("common sense, in addition to evidence put forth by the homeless plaintiffs, suggests that the majority of these homeless will not go to shelters if the City is permitted to disperse them; rather they will find another place on the street upon which to sleep."); see also Shafer Decl. at ¶ 25. Effectively requiring the Church to forgo its work with service resistant homeless persons would force the Church to modify its religious activity; a result that is entirely improper. See, e.g., Jolly, 76 F.3d 468 at 477

(finding that "a substantial burden exists where the state 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.' ") (quoting Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981)).

4.

Plaintiffs next argue that because their Free Exercise rights are implicated, the City's actions must be subject to strict scrutiny analysis. (Pl. Mem. at 32) In response, defendants argue that even assuming, arguendo, that the City substantially burdened the Church's sincerely held religious belief, "[w]here the government seeks to enforce a law that is neutral and of general applicability ... it need only demonstrate a rational basis for its enforcement." Fifth Avenue Presbyterian, 293 F.3d at 574 (citing Church of Lukumi Babalu Ave. Inc., 508 U.S. at 546; Smith, 494 U.S. at 878-79). Defendants contend that the City's actions should not be held to strict scrutiny because they were undertaken to address violations of neutral laws of general applicability in that: (1) homeless persons who sleep on Church property have no access to Church toilet facilities between the hours of 9 p.m. and

5:30 a.m. and relieve themselves in public in violation of § § 143.03, 131.01, and 153.09 of the New York City Health Code, and § 16-118(b) of the New York City Administrative Code; (2) the Church operates a de facto shelter that fails to maintain minimum habitability standards; (3) allowing homeless persons to sleep on Church property is not a proper accessory use and thus violates New York City Zoning Regulation § 12-10; and (4) homeless persons' activities create a public nuisance. (Def. Mem at 16-19)

As an initial matter, defendants' de facto shelter argument can be rejected outright for reasons previously stated.[5] Defendants' argument on the zoning issue must also be rejected because it relies upon an assumption that allowing homeless persons to sleep out-of-doors on Church property "serves no religious function." (Def. Mem. at 19) Because the Court has found here that plaintiffs' actions are in fact based upon a sincerely held religious belief,

[5] See supra note 2.

allowing homeless persons to sleep on their property constitutes a proper accessory use.[6]

5.

The Court now turns to defendants' claim that the City's actions were necessary to protect public health, safety, and welfare from homeless persons who allegedly relieve themselves in public, in violation of City law and in such a way that creates a public nuisance. Defendants devote their argument to several sections of the New York City Health Code and Administrative Code, and the law of public nuisance. They claim the "Free Exercise Clause offers no protection" to plaintiffs' activity "since [plaintiffs are] violating various neutral, generally applicable laws." (Def. Mem. at 14) Their focus on the neutrality and general applicability of individual New York City laws is misplaced. Plaintiffs have challenged the constitutionality of the City's actions, and those actions must pass muster

[6] Plaintiffs' move for summary judgment on their claim under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. (RLUIPA) based on their allegation that the City used its zoning laws to prohibit religious activity. (Pl. Mem. at 50) Because zoning law is no longer at issue, the Court need not reach this claim.

under either a strict scrutiny or rational basis analysis. Thus, in order to avoid strict scrutiny, it is not an individual City law that must be neutral and generally applicable, but the City's actions in applying City law that must be neutral and generally applicable.

In the Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, the Supreme Court found that the neutrality of a challenged government action is suspect where that action "proscribe[s] more religious conduct than is necessary to achieve their stated ends." 508 U.S. at 538. In that case, the Court reviewed a law that prohibited, for public health reasons, the animal sacrifice practice of the Santeria religion. The Court found the neutrality of the law suspect because it was overbroad, in that it resulted in a "flat prohibition" on the targeted religious practice and did not exempt those aspects of the activity which did "not threaten the city's interest in public health." Id. at 538-9. Moreover, the Court found that "[t]he legitimate governmental interests ... could be addressed by restrictions stopping far short of a flat prohibition." Id. at 538.

The record indicates that the City sought a prohibition on homeless people sleeping out-of-doors on Church property.

> "[T]he police came onto Church property and told the Church representatives . . . and the Homeless Neighbors, that the Homeless Neighbors would not be permitted to sleep outside the Church, and that if they lay down on the ground, or remained beyond the time permitted by the police, they would be arrested. The police formed a cordon in front of the Church ... to block the front steps of the Church... All of the Homeless Neighbors who came to the Church that night to sleep were intimidated by police threats, including threats of arrest, into leaving the Church property that night instead of sleeping there. ... The police informed the Church ... that [it] would not longer be allowed to permit anyone to sleep ... on the Church Steps ... and that anyone who attempts to do so ... will be arrested..."

Shafer Decl. at ¶¶ 35, 41; see also Def. Mem. at 7 (acknowledging that the City acted to prohibit sleeping outside the Church); Deposition of Bernard Kerik, July 2, 2002, "Kerik Dep." at 79-80 (" [O]n several nights in December ... we prevented people from setting up . . . [t]elling them that you're not going to be able to . . . sleep there.").

Defendants do not argue that the homeless persons' act of sleeping out-of-doors on Church property violates City law, in and of itself. The fact that there were no arrests and only a single anonymous complaint regarding the homeless persons' conduct (Def. Ex. F) suggests that the misconduct at issue did not constitute a significant subset of the homeless persons' activity during the hours of 9:00 p.m. and 5:30 a.m., as compared to their lawful act of sleeping.[7] That conclusion is strengthened by defendant Bernard Kerik's testimony that, when the City's actions were undertaken, he was unaware of any complaints from the neighborhood and "didn't see a crime being permitted per se." Kerik Dep. at 28-29, 39. Thus, the record suggests, as would common sense, that the pattern of activity that most consistently characterized the homeless persons' presence on Church property was the lawful act of homeless persons sleeping out-of-doors. In light of that, the City's actions to prevent that activity are problematic

[7] In fact, as will be discussed in more depth, defendants have presented evidence indicating, at most, individualized acts of questionable conduct.

because they swept within their ambit a significant amount of harmless, lawful, First Amendment protected conduct.

It is also troubling that the City adopted a group approach to individual violations of the law, taking adverse action against all homeless persons who wished to sleep on Church property based upon individuals' misconduct. See Shafer Reply Decl. at 3 ("the police have responded that they cannot remove just one person, it must be all or none.") The City has thus left no room for homeless persons who sleep on Church property without violating any laws in the process, a fact that is constitutionally problematic. See, e.g., Pottinger v. City of Miami, 810 F. Supp. at 1551, 1577 (S.D. Fla. 1992) ("the challenged ordinances as applied to [the homeless] are overbroad to the extent that they result in class members being arrested for harmless, inoffensive conduct"); Streetwatch v. National Railroad Passenger Corp., 875 F. Supp. 1055, 1065 (S.D.N.Y. 1995) finding unconstitutional ejection of homeless persons from Penn Station for their "mere presence").

In considering whether a governmental action is overbroad, one relevant factor is the severity of the penalty

that resulted from the challenged action. See, e.g., United States v. Rybicki, 354 F.3d 124, n.2 (2d Cir. 2003). Plaintiffs contend, and photographs support their claim, that the City's actions were undertaken in a fairly draconian fashion, in that the City mobilized twenty-two police officers to the Church "bearing nightsticks and large clusters of handcuffs," threatening arrests and accompanied by "three police vans, two squad cars, and a paddy wagon." See Pl. 56.1 Rule Statement at ¶ 47-8; Pl. Ex. 15. This show of force is significant, first, because defendants have not shown that a single arrest was made previously, and, second, because at least one decision-maker did not contemporaneously believe that any laws had been violated. See, e.g., Kerik Dep. at 28-29, 39 (testifying that he "didn't see a crime being permitted per se").[8]

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[8] Moreover, as an enforcement action to address a public nuisance, the City's approach is problematic, because in the absence of imminent danger to life, health or safety, due process mandates that notice and reasonable opportunity to abate the nuisance be provided before enforcement measures are taken. See, e.g., City of New York v. Basil Co., 589 N. Y. S. 2d 319 (N.Y. App. Div. 1992). Plaintiffs allege, and defendants offer no evidence to the contrary, that the Church was not given either. (Shafer Reply Decl. ¶ 9)

The Court is persuaded that the City's interests could have been addressed by restrictions stopping far short of a flat prohibition. Church of Lukumi, 520 U.S. at 538. Plaintiffs contend, and defendants do not dispute, that the Church previously worked with the City to address concerns, and is willing to continue to do so. For example, the Church expanded homeless persons' access to their toilets, hiring someone to supervise the use of Church bathrooms starting at 5:30 am, instead of 7:00 am. See Deposition of Margaret Shafer, May 2, 2002, "Shafer Dep." at 50. Moreover, the Church accepts that the police retain the right to enter Church property to address specific instances of unlawful conduct. See Shafer Dep. at 61-2 ("It is a great comfort to know that . . . [w]e could always ask the police to come and remove anybody... who was being disruptive or dangerous"). However, despite the feasibility of pursuing a narrower approach, the City chose to implement a policy that effectively bans all homeless persons from sleeping out-of-doors on Church property, and in so doing, have burdened a substantial amount of protected conduct. As a result, the Court finds that the

City's actions are overbroad, and do not constitute a neutral government action.

6.

Even if the City's actions were neutral, they are not generally applicable. Government actions are underinclusive, and thus not generally applicable, when, though intended to advance legitimate interests, they result in disparate treatment of religious activity by failing "to prohibit nonreligious conduct that endangers these interests in a similar or greater degree." Church of Lukumi, 520 U.S. at 543.

Plaintiffs argue that the "City treats the Church's Hospitality Ministry in a way that is entirely different from, and less favorable than, its treatment of other activities that infringe upon or violate the regulations that they are attempting to apply to the Church's homeless activities." (Pl. Mem. at 39) Plaintiffs contend that most homeless persons New York City have insufficient access to public toilets and are forced to relieve themselves daily (Pl. Mem. at 22) "on the sidewalk outside Penn Station ... underneath the 59th Street Bridge," (id.) "on Madison Avenue [and] on Third Avenue." (Deposition of Donald Jesse Robison,

March 13, 2003, "Robison Dep." at 21) because "[t]hat is how homeless people cope." (Shafer Dep. at 46) Moreover, plaintiffs argue that

> [r]esidents of the neighborhood walk their dogs every day on the sidewalk on 55th Street. Although most of them . . . "scoop" their animals' "poop" and curb them, they do not wash the sidewalks before the next person walks there . . . they frequently deposit bags of their dogs' "poop" in public waste receptacles on the corner of 55th Street and elsewhere.

Shafer Reply Decl. at 3. Plaintiffs also note that existing New York City law does not "prohibit the urination of dogs on public sidewalks and streets." (Pl. Reply Mem. at 22-3) In contrast, the Church and their homeless guests engage in a daily clean-up, washing the Church steps and sidewalk every morning. See Shafer Dep. at 47-8. Another difference is that much of the activity at issue here occurs on private property, in contrast to similar conduct occurring daily on public property, where conditions affect a vastly greater number of people.[9] Defendants, in turn, have articulated no

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[9] Defendants present evidence from investigations on June 29, 2002, September 5, 2002, and September 6, 2002. Although defendants' papers allege multiple acts of public urination, many are merely speculative. The Initial Report, (Continued . . .)

reason why conduct taking place on private property should be targeted for a flat prohibition, while similar conduct occurring on a daily basis on public property is not.

Because underinclusiveness requires evidence of disparate treatment, the Supreme Court has looked to equal protection jurisprudence for guidance.[10] See, e.g., Church

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(. . . Continued)
purporting to document events memorialized on videotape, contains allegations of what homeless persons "appeared" to do and assumption regarding what was contained in bottles poured into flowerpots, and onto the street and sidewalk. (Def. Ex. G, H) Mere speculation or conclusory allegations are not probative for purposes of summary judgment. See, e.g., Meiri v. Dacon, 759 F.2d 989 (2d Cir. 1985). Two of the three allegations from September 5 are speculative, as are three of the six from September 6. Of the remaining four allegations, three occurred on the Church's private property and involved the Church steps and flowerpot.

[10] The invocation of the Equal Protection Clause does not require a showing that disparate treatment was motivated by plaintiffs' membership in a protected class. For example, the "class of one" Equal Protection jurisprudence directs that a cause of action exists "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the different treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (other citations omitted); see also Cobb v. Pozzi, 363 F.3d 89, 110-111 (2d Cir. 2004). Thus, the fact that plaintiffs allege that their religious activity was singled out, but do not alleged that

(Continued . . .)

of Lukumi, 508 U.S. at 540. In that context, courts have found probative a plaintiff's showing "that the government suddenly began enforcement against it after lengthy period of non-enforcement." West 95th Housing Corp. v. New York City Dept., No. 01 Civ 1345, 2001 WL 664628, at *10 (S.D.N.Y. June 12, 2001) (citing LaTrieste Rest. & Cabaret v. Village of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994)). Plaintiffs present such a claim here. They contend that in November 1999, the Church sent then Police Commissioner Howard Safir a letter to inform him of the Church's formalized policy of allowing homeless persons to sleep on Church property. See Pl. Ex. 11. Defendants themselves concede that "prior to November 2001, some members of the New York City Police Department observed that homeless people had slept on or about the steps of the Fifth Avenue Presbyterian Church and adjacent property." Defendant's Responses and Objections to Plaintiffs' Requests for Admission, Pl. Ex. 31. However, it was not until November 2001, two years

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(. . . Continued)
they were treated differently because of their religion, is not dispositive.

later, that the City acted to prevent homeless persons from sleeping on Church property. See Deposition of John E. Healy, April 24, 2002, "Healy Dep." at 50-1. Defendants, in turn, articulate no reason as to why the City suddenly acted to prevent activities that were ongoing for years.

In sum, the Court finds that the City's policy resulted in unjustifiable differential treatment in that it targeted plaintiffs, yet failed to prohibit the same or similar nonreligious conduct, and as a result is underinclusive and not generally applicable.[11]

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[11] Plaintiffs suggest that the City's proffered law enforcement justifications are "merely a pretext," (Pl. Mem. at 39) that the City's actions were "caused in part by the location of the Church in a district of expensive hotels, restaurants and shops," and were taken "primarily for the purpose of eliminating a visible presence of homeless persons . . . out of a belief that some people think the presence of homeless persons in that zoning district detracts from its beauty, attractiveness, financial well-being and tourist appeal." See Pl. 56.1 Rule Stmt. ¶ 63; Pl. Ex. 3 ("defendants' appellate brief argued that the Church's Hospitality Ministry is inconsistent with 'the upscale commercial character of the corner of 55th Street and 5th Avenue'"). While the Court take no position here on the subjective intent of the City, the pretext assertion, if true, would further support a finding that the City's actions were not generally applicable.

The Court is not persuaded by defendants' claim that the City's actions were necessary to address a public nuisance. A public nuisance is

> conduct or omissions which offend, interfere with, or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of people.

Greentree at Murray Hill Condominium v. Good Sheperd Episcopal Church, 550 N.Y.S.2d 981, 988 (N.Y. Sup. Ct. 1989) (citations omitted). "To sustain a cause of action sounding in public nuisance, the plaintiff must establish by clear and convincing evidence, a substantial and unreasonable interference with the public right." Destefano v. Emergency Housing Group, Inc., 722 N.Y.S.2d 35, 37 (N.Y. App. Div. 2001) (citations omitted). The alleged conduct includes: panhandling, prostitution solicitation, littering, altercations, public urination and defecation, and operation of a de facto shelter that fails to meet minimum

standards of habitability.[12] That such conduct violates particular ordinances is not dispositive. See, e.g., State v. Fermenta ASC v. Corp., 656 N.Y.S.2d 342, 403 (N.Y. App. Div. 1997).

Although defendants take issue with panhandling that occurred on or near Church property, such conduct is a form of speech that cannot be banned outright, unless it takes an aggressive form. Loper v. New York City Police Dept., 999 F.2d 699 (2d Cir. 1993). Defendants present, at best, two instances of panhandling[13] (Def. Ex. G, H), and make no allegations that either was aggressive. The same is true for defendants' complaint regarding "a woman who was soliciting as a prostitute," an allegation that they do not dispute is based on a single incident. See Shafer Dep. at 59. Such individualized instances of misconduct, not of a

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[12] With respect to defendants' claim that a public nuisance is created by the Church's operation of a de facto shelter that fails to meet minimum standards of habitability, the Court rejects this argument for reasons previously stated. See supra, note 2.

[13] Defendants contend that a homeless man was observed "asking passerbys for money" and that "[h]e did this one other time," without alleging the time, date, or location of a second incident. (Def. Ex. H)

violent or aggressive nature, simply cannot, without more, constitute a substantial and unreasonable interference with the public right.

Defendants also argue that instances of littering contributed to a public nuisance. (Def. Mem. at 20) However, they do not dispute that the Church engages in daily clean-up activities, washing the Church steps and sidewalk every morning (Shafer Dep. at 47-8), and that any litter "is cleaned up and discarded ... everything ... is cleaned up every morning." Shafer Dep. at 50. Nor do defendants suggest that plaintiffs' daily efforts are insufficient. The Court cannot agree that sporadic littering, addressed by daily cleaning, can contribute to the creation of a public nuisance.

Additionally, defendants complain of "instances of altercations" (Def. Mem. at 20), and present evidence from an investigation of activity on Church property on three nights: June 29, 2002, September 5, 2002, and September 6, 2002. On September 5 and 6, exchanges among homeless persons consisted of yelling, a homeless man putting his finger in the face of another man, and a man hitting a woman. (Def. Ex. G, H) Such facts do not support

a finding of a pattern of violent behavior, particularly given that defendants have not received a single complaint about violent conduct by homeless persons on or near Church property, and have not made a single arrest. Moreover, the nuisance standard in New York City is necessarily different than in other locales because "[i]n a densely populated municipality ... daily interactions and even altercations are far more extensive than elsewhere[,] ... are not uncommon and are all a part of life in a crowded metropolis." Domen Holding Co. v. Aranovich, 753 N.Y.S.2d 57, 61 (N.Y. App. Div. 2003), aff'd as modified on other grounds, 769 N.Y.S.2d 785 (N.Y. 2003).

The final factual allegation is that homeless persons who sleep on Church property engage in "public urination and inappropriate disposal of sewage." (Def. Mem. at 20) As stated previously, to constitute a nuisance, conduct must offend public morals, interfere with use by the public of a public place, or endanger or injure the property, health, safety or comfort of a considerable number of people. Defendants do not contend that public urination and defecation by homeless persons sleeping on a Church's private property offends public morals, and defendants

point to only a single complaint from the public regarding the conduct at issue, (Def. Ex. F); a significant fact because complaints are probative of community opinion. See, e.g., State v. Monoco Oil Co., 713 N.Y.S.2d 440, 444 (N.Y. Sup. Ct. 2000). The nature of the locale is also relevant to this analysis, see, e.g., Domen Holding Co.,753 N.Y.S.2d at 61, and as most New York City residents can attest, homeless persons sleeping and performing basic human functions in public is not uncommon. Thus, that such activity occurs on Church property, with the full consent of the Church, is hardly the type of conduct likely to offend the community,[14] but rather, is simply the reality of our life in a crowded metropolis." Id.

Neither do defendants claim that the activity at issue interferes with the use of a public place. In fact, the record suggests that much of the conduct at issue here took place on the Church's private property.[15]

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[14] The moral offense that some might take to the very existence of homelessness in our society is not the type of offense that is relevant to the public nuisance analysis.

[15] See supra note 9.

The remaining ground for a public nuisance finding is that the property, health, safety or comfort of a considerable number of people have been endangered or injured. Although the conduct at issue violates the City's Health Code, that fact alone is insufficient to show that the health of a considerable number of people has in fact been endangered or injured. See, e.g. Fermenta ASC Corp., 656 N.Y.S.2d at 403. Mere speculation about danger or injury is not generally sufficient, see, e.g., Greentree at Murray Hill Condominium, 550 N.Y.S.2d at 988, and successful nuisance claims typically include evidence of the actual danger or injury resulting from challenged conduct. See, e.g., Monoco Oil Co., 713 N.Y.S.2d at 445; Fermenta ASC Corp., 656 N.Y.S.2d 342; City of New York v. New Saint Mark's Bath House, 497 N.Y.S.2d 979 (Sup. Ct. 1986), aff'd 505 N.Y.S.2d 1015 (N.Y. App. Div. 1986). Defendants have not proffered any evidence that the conduct at issue endangers or injures anyone's health, much less the health of a considerable number of people. Defendants also do not dispute that the Church cleans the affected area on a daily basis, thereby abating some substantial portion of the alleged nuisance. See Shafer

Reply Decl. ¶ 6; Shafer Dep. at 47-48, 50; Deposition of James McCoy, August 23, 2002, "McCoy Dep." at 58.

Finally, the concept of reasonableness is one that permeates the case law on nuisance. See, e.g., County of Westchester v. Town of Greenwich, Connecticut, 76 F.3d 42, 45 (2d Cir. 1996). With respect to the conduct here, it is relevant that homeless persons live their lives in public places, sleeping, eating, and even relieving themselves in public because many have, or feel they have, no alternative.[16] As a result, if the homeless persons who wish to sleep on Church property were prevented from doing so, many would simply move to another location and continue to engage in identical conduct. The City's actions thus would not prevent public urination and defecation, but would succeed only in relocating the conduct elsewhere. Moreover, if reasonableness is to prevail, organizations that works with homeless individuals by meeting with them, learning about their individual histories and needs, providing encouragement and assistance, and giving them a place to sleep at night (Shafer Decl. at ¶ 18), should be

[16] See discussion of service-resistance, supra Section 3.

encouraged, [illegible] discouraged. This is particularly true, given that the Church has demonstrated a willing to address the City's concerns: adopting Rules to discourage misconduct (Pl. Ex. 9); allowing access to toilets at 5:30 a.m. instead of 7:00 a.m. (Shafer Dep. at 50); cleaning the affected area on a daily basis; and welcoming the police to address any potentially dangerous incidents. (Shafer Dep. at 47-8, 50)

For the reasons discussed, the Court is not persuaded that defendants have presented evidence sufficient to establish the existence of a public nuisance.

8.

Plaintiffs argue that the City's actions burdened their First Amendment rights to free speech. In order for conduct to warrant First Amendment free speech protection, it must be "reasonably understood by the viewer to be communicative," Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) an analysis that depends wholly on context. Id. at 294.

Defendants argue that the homeless persons' conduct is not expressive because it bore none of the indicia of "a larger organized protest that is normally

accompanied by signs and literature." (Def. Mem. at 10-11) However, indicia of protest is not a requirement of expressive conduct. See e.g., Bery v. City of New York, 97 F.3d 689, 696 (2d Cir 1996) (recognizing that selling street art is First Amendment conduct because it conveys a message that "[a]nyone, not just the wealthy, should be able to view it and buy it."). Rather, the relevant inquiry is whether the conduct at issue is "inseparably intertwined with a 'particularized message.' " Id. 695 (quoting Young v. New York City Transit Authority, 903 F.2d 146, 153 (2d Cir. 1990)) Defendants argue that the homeless persons' conduct is not expressive because it did not communicate any particular message. (Def. Mem. at 10-11) Defendants' focus on the conduct of the homeless persons is misplaced. The expressive conduct at issue here is not that of the homeless persons, but rather the Church's act of allowing homeless persons to sleep out-of-doors on its property. Plaintiffs argue that the Church's act is expressive conduct because it is their "way of telling the world that the poor and the homeless are welcome and not forgotten ... it is a visible and easily understood challenge to our society's tendency toward apathy, materialism, despair and

irresponsibility." Shafer Decl. ¶¶ 68-9. The Court is persuaded that by allowing such activity, the Church engaged in expressive conduct by communicating a highly particularized, easily understood, religious and political message regarding how homeless persons should be treated by society.[17]

9.

Having determined that plaintiffs' conduct at issue here deserves First Amendment protection, the Court turns to an application of the proper constitutional analysis. "Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny." Fifth Avenue Presbyterian, 293 E.3d at 574 (citing Church of Lukumi Babalu Aye, Inc., 508 U.S. at 546).

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First

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[17] Plaintiffs also argue that their rights to free association under the First Amendment were burdened. (Pl. Mem. at 31) Because the Court has found that plaintiffs' First Amendment Free Exercise and Free Speech rights were implicated, this argument need not be reached.

> Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the Smith requirements is not "water[ed] down" but "really means what it says." A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.

Church of Lukumi, 508 U.S. at 546 (citations omitted).

Defendants argue that the City's policy was implemented in order to advance its interest in public health, safety, and welfare. (Def. Mem. at 15). However, when

> (t)he proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower [actions] that burdened religion to a far lesser degree [then [t]he absence of narrow tailoring suffices to establish the invalidity of the [actions].

Church of Lukumi, 520 U.S. at 546 (citations omitted). Assuming arquendo that the City's interests are compelling, the City's actions were "not drawn in narrow terms to accomplish those interests" Church of Lukumi, 508 U.S. at 546, because, as discussed in Sections 5 and 6, supra, the

City's actions are overbroad and underinclusive in substantial respects.

Additionally, defendants have not demonstrated that the interests at issue here are compelling. The Court is mindful that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." Id. at 547 (citations omitted). As discussed in depth previously,[18] the City's actions to prevent homeless persons from sleeping out-of-doors on Church property are substantially underinclusive, and thus do not advance "interests of the highest order." Church of Lukumi, 508 U.S. at 546-47.

Regardless of the outcome of the Free Exercise claim, the City's actions unconstitutionally burden the Church's free speech rights as an independent matter. Although distinct analyses exist, depending on whether the challenged action discriminates on the basis of content or is content-neutral, the City's actions fail even the more lenient test, which provides that

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[18] See supra Section 6.

> [a) content-neutral regulation may restrict the time, place, and manner of protected speech, provided that it is "narrowly tailored to serve significant governmental interests" and "leave[s] open ample alternative channels for communication

Bery, 97 F.3d at 697. In the instant case, regardless of whether the City's interests are significant, the City "cannot bar an entire category of expression to accomplish ... accepted objective[s] when more narrowly drawn regulations will suffice." Id. The City's actions "effectively bar" homeless persons from sleeping out-of-doors on Church property and prevent the Church from spreading its message, and thus are "too sweeping to pass constitutional muster." Id. see also Metropolitan Council, 99 F. Supp. at 439, 448 (finding complete ban on sleeping on public sidewalks is not narrowly tailored).

The Court finds that no genuine issues of material fact remain as to Plaintiffs' First Amendment claim. Thus, plaintiffs' motion for summary judgment and a declaratory judgement on that claim is granted, and accordingly,

defendants' cross motion for summary judgment is denied.[19]

10.

The Court turns to plaintiffs' request that (1) the Court reconsider its decision denying an injunction as to the Church' sidewalk, and (2) the preliminary injunction be made permanent as to the Church staircases, and the Church sidewalk area as well. (Pl. Mem. at 37, 51) As to the Church sidewalk, Plaintiffs contend that the Court's January 2002 Order was erroneous in holding that "the Police Department does have authority to regulate those portions of the 55th Street sidewalk that are owned by the Church. The Church has not shown that the potion of the sidewalk on 55th Street that it owns is not, at the same time, a public place."

Plaintiffs first argue that at night the Church sidewalk is not a public place," because the Church allows homeless persons to sleep there, effectively making it

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[19] Plaintiffs also move for summary judgment on their § 1983 claim. Section 1983 is not itself a source of substantive rights; it merely provides a method for vindicating federal rights elsewhere conferred. 42 U.S.C.A. § 1983 (West 2004).

closed to pedestrians at night, and because it does not appear on a City map. (Pl. Mem. at 38-9) ; (Pl. Reply Mem. at 24) However, the New York City Administrative Code includes "sidewalks" in its definition of a public place, NYC Code § 10-125(a)(2), and defendants present case law supporting that conclusion. See, e.g., People v. Lieberman, 32 Misc.2d 741, 743 (Ct. of Special Sessions of the Village of Mount Kisco 1961); Fieldston Property Owners Ass'n., Inc. v. Bianchi, 215 N.Y.S.2d 834 (Sup. Ct. 1961), aff'd, 16 A.D.2d 902 (App. Div. 1962), aff'd, 13 N.Y.2d 699 (1963)).

Plaintiffs also argue that the City's sidewalk regulations are not applied in a neutral and generally applicable way because the Church is treated less favorably than those who receive "individual exemptions" to use sidewalks for parades and film crews, for example. (Pl. Mem. at 40-1) Plaintiffs have not shown that such uses are substantially similar, nor have they presented any other evidence to support a finding of disparate treatment. The Court is not persuaded that its original conclusion should be altered.

With respect to the staircases, Plaintiffs have made a showing of actual success on the merits of their First Amendment claim, and demonstrated that they will suffer irreparable harm, through deprivation of those rights, absent the permanent injunction sought. See, e.g., First Avenue Presbyterian Church, 293 F.3d at 574 (finding that violations of First Amendment rights are commonly considered irreparable injuries).

11.

It is ORDERED that the defendants are permanently enjoined from entering onto the property of the plaintiff Fifth Avenue Presbyterian Church described below for the purposes of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property, provided that nothing in this order shall limit the authority of the New York City Police Department to arrest any person for other conduct that is unlawful, or from removing from Church property anyone who is present there without the consent of the Church, or from removing homeless persons from Church property during a winter alert officially declared by the New York City Department of Health. For the purposes of this order, the portion of the

Church's property at issue constitutes the three staircases that extend from the Church building towards Fifth Avenue, and the two staircases that extend from the Church building toward 55th Street. The Clerk is directed to enter judgment in favor of plaintiffs accordingly.

SO ORDERED.

Dated: October 28, 2004
Issued: 3:35 P.M.

Lawrence M. McKenna
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FIFTH AVENUE PRESBYTERIAN CHURCH, et al.,

Plaintiffs,

01 Civil 11493 (LMM)

-against-

JUDGMENT

THE CITY OF NEW YORK, BERNARD KERIK, and RUDOLPH GUILIANI,

Defendants.

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The parties having cross-moved for summary judgment pursuant to Fed. R. Civ. P. 56, and the matter having come before the Honorable Lawrence M. McKenna, United States District Judge, and the Court, on October 28, 2004, having rendered its Memorandum and Order directing the Clerk of the Court to enter judgment in favor of plaintiffs and permanently enjoining defendants from entering onto the property of the plaintiff Presbyterian Church described below for the purpose of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property, provided that nothing in the Memorandum and Order dated October 28,

2004 shall limit the authority of the New York City Police Department to arrest any person for other conduct that is unlawful, or from removing from the Church property anyone who is present there without the consent of the Church, or from removing homeless persons from Church property during a winter alert officially declared by the New York City Department of Health and for the purpose of the Memorandum and Order dated October 28, 2004, the portion of the Church's property at issue constitutes the three staircases that extend from the Church building towards Fifth avenue, and the two staircases that extend from the Church building toward 55th Street, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated October 28, 2004, judgment is entered in favor of plaintiffs and defendants are permanently enjoined from entering onto the property of the plaintiff Presbyterian Church described below for the purpose of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property, provided that nothing in the Memorandum and Order dated October 28, 2004 shall limit

the authority of the New York City Police Department to arrest any person for other conduct that is unlawful, or from removing from the Church property anyone who is present there without the consent of the Church, or from removing homeless persons from Church property during a winter alert officially declared by the New York City Department of Health and for the purpose of the Memorandum and Order dated October 28, 2004, the portion of the Church's property at issue constitutes the three staircases that extend from the Church building towards Fifth avenue, and the two staircases that extend from the Church building toward 55th Street.

Dated: New York, New York
October 29, 2004

J. MICHAEL McMAHON
Clerk of Court

BY: _____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United Stated Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 26th day of April, two thousand and six.

Present: ROSEMARY S. POOLER,
SONIA SOTOMAYOR,
Circuit Judges.

EDWARD R. KORMAN,*[32]
District Judge.

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* The Honorable Edward R. Korman of the United States District Court for the Eastern District of New York sitting, by designation.

FIFTH AVENUE PRESBYTERIAN CHURCH, GLADYS ESCALERA, NICHOLAS NESRON, WILLIAM P. RASMUSSEN, DONALD J. ROBISON, VERONICA A. LESTER, ALFRED MCKENZIE, ALFRED BROWN, DENNIS PAIGE, PEABODY DENNIS, STEFANI PARY, AND MARGARET SHAFER,

Plaintiffs-Appellees-Cross-Appellants.

(04-6299-cv)

-v-

CITY OF NEW YORK, BERNARD KERIK, RUDOLPH GIULIANI, RAYMOND W. KELLY AND MICHAEL R. BLOOMBERG,

Defendants-Appellants-Cross-Appellees.

Appearing for Plaintiffs-Appellees-Cross-Appellants: Carter G. Phillips, Sidley Austin Brown & Wood LLP, Washington, D.C.

Appearing for Defendants-Appellants-Cross-Appellees: Mordecai Newman, Assistant Corporation Counsel, New York City Law Department, New York, New York.

Appeal from the United States District Court for the Southern District of New York (Lawrence M. McKenna, District Judge).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED.**

Defendants-appellants-cross-appellees ("the City") appeal from the memorandum and order entered October 29, 2004, in the United States District Court for the Southern District of New York (Lawrence M. McKenna, J.), granting plaintiffs-appellees-cross-appellants' ("the Church") motion for summary judgment in part and denying the City's motion in part. Fifth Avenue Presbyterian Church v. City of New York, No. 01 Civ. 11493, 2004 WL 2471406 (S.D.N.Y. Oct. 29, 2004). We assume the parties' familiarity with the facts, procedural history, and specification of issues on appeal.

This Court reviews de novo the district court's grant of summary judgment, construing the evidence in the light most favorable to the nonmoving party. Giordano v. City of New York, 274 F.3d 740, 746 (2d Cir. 2001). Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The judgment of the district court from which the City appeals is a permanent injunction. While it enjoins the defendants "from entering onto the property of the plaintiff Fifth Avenue Presbyterian Church ... for the purposes of dispersing or arresting any person who shall be sleeping or otherwise lawfully on that property," it does not "limit the authority of the New York City Police Department to arrest any person for other conduct that is unlawful, or from removing from Church property anyone who is present there without the consent of the Church, or from removing homeless persons from Church property during a winter alert officially declared by the New York City Department of Health."

While we do not agree with all of the reasons set forth in the Memorandum and Order, we affirm and add these observations.

When discussing the City's public nuisance justification, the district court correctly noted that the City

did not proffer any evidence that the conduct endangers or injures anyone's health. Indeed, the City provided no medical evidence that the homeless people who spent the night on Church property constituted a health risk to themselves or to the public at large. We note that mere speculation about potential injuries is insufficient to establish the existence of a public nuisance. Moreover, the City's public nuisance argument arose over the course of this litigation. All of the public nuisance evidence cited in the City's brief was gathered after the implementation of its ban on outdoor sleeping on Church property. At the time of the raids, the City did not cite the alleged health and administrative code violations upon which it now relies as justification for its actions.

The district court cites New York City Administrative Code § 10-125(a)(2) for the proposition that the Code includes "sidewalks" in its definition of a public space. See Fifth Ave. Presbyterian Church, 2004 WL 2471406, at *12. Section 10-125, however, pertains solely to the consumption of alcohol in public places and it explicitly limits its definitions to terms "whenever used in this section." See § 10-125(a). Therefore, we cannot endorse the district court's use of § 10-125.

Accordingly, for the reasons set forth above, the judgment of the District Court is hereby **AFFIRMED.**

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk of the Court
by

Lucille Carr